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In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

JEFFREY COLE
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300
Counsel for Appellants

Of Counsel:
STANLEY T. KALECZYC
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3180

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment.

2. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the failure of the Federal Election Campaign Act Amendments of 1976 to define the term "solicitation" infringes plaintiffs' right of assembly guaranteed by the First Amendment, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, which are as yet unreported, are reproduced as Appendix A, *infra*.

JURISDICTION

The judgment of the court of appeals sustaining the constitutionality of 2 U.S.C. §441b(b)(4)(D) was entered on December 5, 1980. Notice of Appeal to this Court was filed on December 18, 1980. (Appendix B, *infra*). This Court has jurisdiction pursuant to 2 U.S.C. §437h(b). *See Buckley* v. *Valeo*, 424 U.S. 1, 6-13 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

This case raises constitutional challenges to those provisions of the 1976 Amendments to the Federal Election Campaign Act ("the Act")[1] which regulate the solicitation activities of trade associations and their separate segregated funds.[2] Following protracted proceedings in the district court and the court of appeals,[3] the district court made elaborate factual findings regarding, *inter alia*, the impact of the Act on the solicitation activities of the plaintiffs. *See* App. A at 6.

The district court found that §441b(b)(4)(D) (App. C at 52) had "substantially" curtailed plaintiffs' solicitation activities[4] and their ability to engage in other forms of

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[1] 2 U.S.C. §431 *et seq.*

[2] These funds are commonly known as political action committees or PACs.

[3] In December, 1979, the Court of Appeals for the Seventh Circuit held that pursuant to the Act's special judicial review provisions (2 U.S.C. §437h), it and not the district court was the proper forum for initial resolution of the plaintiffs' constitutional challenges. *See* Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979). Accordingly, the court of appeals directed the district court to make findings of fact, prepare a certified record, and identify and certify the constitutional issues raised by the complaint. *Id.* at 36.

[4] An integral part of these solicitation activities prior to the 1976 Amendments, as well as today, involves discussion and espousal of the political and social ideas, opinions, views and beliefs of each plaintiff concerning matters of national concern and of concern to their respective industries. (Finding 196).

protected political speech and association. The court also found that the Act had limited the right of persons with similar or related interests to receive from the plaintiffs communications expressing political ideas, opinions, views and beliefs and to associate themselves with the plaintiffs. (Findings, 188; 194; 197-198; 200).

Prior to the enactment of §(D), the plaintiffs[5] had solicited voluntary contributions from individuals who shared their political and economic goals, without regard to whether the potential contributor was an executive or a stockholder of the corporations which comprised the membership of the particular association. These solicitations were conducted without first having obtained permission from the member corporations. (Finding 195).[6]

With the enactment of §(D) in May 1976, trade associations were compelled to drastically alter their solicitation activities. For under §(D), trade associations were now permitted only to solicit contributions from the stockhold-

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[5] Plaintiffs are the National Restaurant Association ("NRA") and its political action committee, the Restaurateurs' Political Action Committee ("RPAC"); the National Lumber and Building Material Dealers Association ("NLBMDA"), and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"); and the Bread Political Action Committee ("BreadPAC"), the political action committee of the American Bakers Association. These political action committees are separate segregated funds registered with the Federal Election Commission ("FEC") pursuant to 2 U.S.C. §433.

[6] For example, prior to 1976, BreadPAC and RPAC engaged in extensive solicitation of the approximately 120,000 individuals who, in total, attended the annual conventions of the American Bakers Association and the National Restaurant Association. (App. A at 36-37). (Findings 120-123; 175-177).

ers and the executive and administrative personnel of their corporate members.[7] Moreover, §(D) mandated, as an indispensable precondition to such solicitation, that trade associations first obtain the written permission of the member corporation. Once obtained, that permission is operative only in the calendar year in which it is given; and permission can be given by the member corporation only to one trade association PAC, regardless of how many trade associations to which the particular corporation may belong.[8] Solicitation without compliance with these strictures subjects the solicitor to the criminal and civil sanctions of the Act.

In response to the devitalizing impact of §(D), the plaintiffs filed a complaint against the FEC in the United States District Court for the Northern District of Illinois. The complaint charged that §(D), both facially and as applied: (i) constituted an unconstitutional prior restraint in violation of the First Amendment; (ii) that it abridged the speech and associational rights of the plaintiffs, those executive and administrative personnel and stockholders of the corporations which comprised the trade associations' memberships, and of those persons who shared an "affinity of interest" with plaintiffs; (iii) that it deprived the plaintiffs of due process of law in violation of the Fifth Amendment in that it imposed substantially dissimilar restrictions upon trade association PACs than were im-

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[7] Under the Act, a trade association is prohibited from soliciting any person other than the executive and stockholders of its corporate members and its *own* executive personnel.

[8] The district court found that no comparable restrictions are imposed upon union, corporate or independent PACs. (App. A at 44).

posed on the PACs of unions, membership organizations, and independent PACs; and (iv) that its disavowal of the dictionary definition of the term "solicitation" in favor of the definition, "*anything* which *might* fairly be deemed a request for a contribution," rendered the statute impermissibly vague and overbroad.

Following extensive discovery, the district court certified four constitutional questions to the court of appeals.[9] That court, sitting *en banc* as the court of first impression pursuant to 2 U.S.C. §437h, was sharply divided on the question of whether §(D), both facially and as applied, violated the First Amendment and whether it invidiously discriminated against trade associations in violation of the Due Process Clause of the Fifth Amendment.

Five members of the court held that §(D) neither constituted a prior restraint nor otherwise violated the First Amendment. (App. A at 10). Chief Judge Fairchild and Judges Pell and Bauer vigorously dissented, holding that §(D) was an unconstitutional prior restraint. In addition, they held that even if §(D) did not constitute a prior restraint, it unconstitutionally abridged the speech and associational interests of not only the plaintiffs, but of potential contributors and others with whom the plaintiffs shared an affinity of interest. (App. A at 30-41).

The court of appeals was also divided on the question of whether §(D) deprived the plaintiffs of due process of law. Five members of the court answered this question in

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[9] In addition to the three questions set forth *supra* at I, the district court also certified as question 4, "whether the failure of the . . . Act . . . to define the term "trade association" as used in [§(D)] violates the due process clause of the Fifth Amendment . . . .?" (*See* App. A at 6). We seek review by this Court only of questions 1, 2 and 3. *See supra*, at I.

the negative. (App. A at 16). The minority held that by requiring trade association PACs to obtain written permission as a precondition to soliciting a member corporation's executive and administrative personnel or their stockholders, while imposing no similar restrictions on the solicitation activities of other PACs, §(D) invidiously discriminated against trade association PACs in violation of the Fifth Amendment. (App. A at 41).[10]

[10] In addition, the court unanimously rejected as "frivolous" the FEC's contention that the case did not present a justiciable controversy. (App. A at 7). The court also unanimously reaffirmed its prior holding, *see* 591 F.2d 29, that the plaintiffs had standing to invoke the expedited review provisions of §437h, which the court held embraced claims of unconstitutional application of the Act as well as facial unconstitutionality. (App. A at 8). Finally, the court unanimously answered in the negative the third and fourth certified questions.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

No less than in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this case is infused with issues which implicate the most fundamental philosophical and constitutional postulates on which this Nation was built and on which it continues to subsist. And, no less than in *Buckley*, this case raises issues which lie at the core of the First Amendment and the Nation's political process.

Despite the deep division in the court of appeals regarding the constitutionality of §(D), the entire court unhesitatingly agreed that "the questions presented . . . are *'substantial'*, ..." (App. A at 9, n.6) (Emphasis supplied). And the FEC, in proceedings in the district court, acknowledged that the case presented "serious constitutional issues" which "go to the heart of the [Federal Election Campaign] Act" and which have "potential far reaching impact on the . . . Act . . . ."[11]

Careful examination of the majority's conclusions leads to the firm conclusion that the questions raised by this case are substantial and that plenary review by this Court is imperative. As we shall demonstrate, the majority's conclusion that §(D) is neither a prior restraint nor otherwise violative of speech and associational rights is contrary to fundamental First Amendment doctrine. In addition it ignores the district court's explicit findings that the statute has substantially curtailed the plaintiff's solicitation activities and affected the speech and associational rights of the plaintiffs and vast numbers of American citizens. By sustaining an Act which has had so pronounced an effect on

[11] *See* "Motion of the [FEC] to Reschedule the Due Date For the Pretrial Materials and the Dates For the Pretrial Status Hearing and Trial" at 2, 5. *Accord* "Motion of the [FEC] For Leave to File In Excess of Twenty Interrogatories" at 3.

the solicitation of political contributions, the majority has eroded the underlying rationale of *Buckley*, which upheld the Act's contribution limitations precisely because they did not adversely affect the ability of candidates and political committees to freely solicit and aggregate political contributions. *See* 424 U.S. at 21-22; 28, n.31.

Of equal import is the majority's holding that although union, corporate and independent PACs are unencumbered by the restraints imposed on trade associations by §(D), that section does not violate the Due Process Clause of the Fifth Amendment. Finally, there are the very significant and substantial questions concerning the vagueness and overbreadth of §(D). These factors alone suffice to warrant plenary consideration by this Court. When to the balance is added the irreconcilable conflict between the Department of Justice and the FEC regarding the permissible reach of the Federal Election Campaign Act, the need for full briefing and argument becomes ineluctable.

It is the FEC's view that the Congress could, consistent with the First Amendment, prohibit the use of corporate (or union) funds to defer the administrative costs of political solicitations. As evidenced by a 1975 opinion letter from Mr. Richard Thornburg, the then Assistant Attorney General of the Criminal Division of the Department of Justice, (App. D at 53), the FEC's view is not shared by the Agency which, for more than sixty years, has been responsible for prosecutions under the Tillman Act, the Federal Corrupt Practices Act and the Federal Election Campaign Act.

That letter was in response to an FEC request for the Department's legal opinion as to whether 18 U.S.C. §610 could constitutionally prohibit the use of corporate and union funds in connection with PAC solicitation if directed to anyone other than shareholders and union members. In that opinion, "which is entitled . . . to great weight,"[12] the Department of Justice stated that the prohibition of

[12] Pipefitters v. United States, 407 U.S. 385, 409 (1972).

corporate "contributions and expenditures"[13] could not, consistent with the First Amendment, be so narrowly limited. Rather a corporate (or union) PAC has the constitutional right to use its own funds to defer the costs of solicitation activities directed toward any person or group having an *affinity of interest* with the corporation (or union). *See* discussion infra at 26.[14] This conflict further demonstrates the necessity for plenary review by this Court.[15]

A.

SECTION (D) CONSTITUTES A PRIOR RESTRAINT ON THE ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THE EXECUTIVE AND ADMINISTRATIVE PERSONNEL OF THEIR CORPORATE MEMBERS

By prohibiting solicitations of the executive personnel and the stockholders of corporations comprising the membership of trade associations, without the prior written approval of and permission from the corporate members, §(D) has created a system of prior restraint, indistinguishable in its censoring effect on speech and associational freedoms,[16] from the licensing systems consistently invali-

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[13] *See generally,* United States v. Auto Workers, 352 U.S. 567 (1957). This prohibition, which was formerly codified in 18 U.S.C. §610, is now found in §441b(a) of the Federal Election Campaign Act. *See* App. C at 49.

[14] Although the Thornburg letter antedated §(D) and did not explicitly address the precise questions raised by this case, its underlying rationale applies here *a fortiori.*

[15] While the majority insisted that the question of the constitutionality of §441b(a) and (b)(2) was not before the court (App. A at 24, n.18), it is clear that they *sub-silentio* subscribed to the government's thesis which played a substantial role in their ultimate decision. *See* App. A at 10; 14; 19.

[16] The making of political contributions is a form of associational activity lying at the core of the First Amendment. *See* Buckley v. Valeo, 424 U.S. 1, 65-66 (1976).

dated by this Court.[17]

Under the regime of censorship compelled by §(D), corporations have the unbridled power to determine whether they will allow their stockholders or executives to receive political solicitations from the trade association to which they belong. There are no standards or criteria to guide the censorial decisions of corporations acting in their compelled capacity as instrumentalities of the government; instead "the yea or nay saying by [corporate] officials becomes the standard of the permissible." *Joseph Burstyn* v. *Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring). There is no review either by an administrative or judicial body of the corporate censor's arbitrary determination of whether it will allow a communication between a PAC and one or more of its stockholders or employees, and the potential recipient has no voice in the matter. Finally, no time frame is established within which the corporation must respond to a solicitation request. In fact, the Act does not even require the corporate censor to respond, in which event, the failure to respond is treated as a denial of permission.[18]

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[17] The absence of formal similarity between §(D) and the more commonly encountered forms of restraint is of no moment. For, in testing the constitutionality of a statute which is alleged to violate the doctrine of prior restraint, "the judicial angle of vision . . . is the operation and effect of the statute in substance." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957). *See also* App. A at 34; Near v. Minnesota, 283 U.S. 697, 709, 711-13, 723 (1931); ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973) (3 judge court), *dismissed as moot*, 422 U.S. 1030 (1975).

[18] In 1978, only 6% of the American Bakers Association's members expressly refused permission to solicit; 59% failed to respond to the ABA's requests. The result was that the employees and stockholders of 65% of the companies comprising the ABA could not be solicited. The percentage of ABA members not responding to requests to solicit was double that in 1976. (Finding 128; App. A at 33).

Despite the operative effect of §(D) and despite its devitalizing impact on the speech and associational rights of the plaintiffs and vast numbers of American citizens,[10] the majority, without any analysis, held that §(D) was not a prior restraint and that any prior restraining effects were, at best, "tenuous" and "'marginal'". (App. A at 12; 14). This conclusion, *which ignored the district court's contrary findings of fact, see supra* at 2, seems to be predicated upon the following premises: solicitation is a form of "political expression" protected by the First Amendment (App. A at 10); plaintiffs are engaged on a daily basis, unimpeded by § (D), in many other forms of "political expression" protected by the First Amendment; therefore, any restraining effects of § (D) on solicitation are tenuous since the overall quantum of "political expression" is not materially affected. (App. A at 13-14).

The essential flaw in this reasoning is that it overlooks the constitutionally significant fact that solicitation for political contributions is a descrete form of First Amendment activity, separate and distinct from other forms of protected speech and association. In short, while solicitation may be described as a form of "political expression,"

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[10] Since most trade associations are comprised of corporations (App. A at 42-43), the censorial effect of §(D) is staggering. For example, of the 1600 corporate members of the Direct Mail Marketing Association, only 75 gave permission to solicit a total of 90 individuals in 1978 even though the total pool of permissible (employee) solicitees numbered from 100,000 to 300,000. (*See* Deposition of Francis Andrews at 43-46: 140-47). In 1978, RPAC sent almost 16,000 separate requests to NRA member corporations seeking permission to solicit. Only 1,168 members granted permission to solicit approximately 3,000 individuals, 393 of whom actually contributed. (Findings 104-06; App. A at 33). Similarly in 1978, only 35% of the corporations comprising the membership of the American Bakers Association granted permission to Bread PAC to solicit a total of 421 individuals. (See Findings 128; 139; App. A. at 37)

it is not a fungible part of some monolithic whole encompassing all the varied speech and associational activities which fall within the ambit of the First Amendment. By indiscriminantly characterizing the plaintiffs' widely disparate First Amendment activities, including solicitation, as "political expression" and treating them as identical strands in a seamless web, the majority evaded rather than answered the question of whether §(D) constituted a prior restraint on *associational* freedoms. Moreover, as the dissenters demonstrated, the fact that a statute only results in a partial, rather than a total, paralysis of First Amendment activity does not make constitutionally palatable that which is otherwise impermissible. (App. A at 30-31).

Equally unacceptable is the majority's second basis for the conclusion that §(D) is not a prior restraint. By reconstituting their membership to include only individuals rather than corporations, the majority reasoned, trade associations would thus be free to solicit the individual members, unfettered by the prior permission rule of §(D). (App. A at 13). The notion that the unconstitutional can be miraculously transformed into the constitutional by the alchemy of avoidance is contrary to fundamental First Amendment precepts, *see e.g., Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975), and accords constitutional dignity to an irrelevance.

Moreover, the majority's conclusion puts out of view a half century of decisions invalidating any apparatus of prior restraint. Beginning with *Near* v. *Minnesota*, 283 U.S. 697 (1931), this Court, in an undeviating series of opinions, has made clear that prior restraints are the most serious and least tolerable infringements on First Amendment rights, and that *any* system of prior restraint is presumptively unconstitutional. (App. A at 34).

In order for the government to meet its exacting burden of proving constitutionality, it must demonstrate: a) that there exists precisely drawn regulations sufficient to obviate the dangers of a censorship system; b) that the case falls within those "exceptional cases" such as obscenity, obstruction to the conduct of a declared war, or incitement to violence; and c) that absent imposition of the restraint, there will surely result direct, immediate and irreparable damage, for the First Amendment will not tolerate prior restraints predicated upon surmise or conjecture that untoward consequences may result.[20]

Section (D) fails to satisfy any of these criteria. There are no procedural safeguards designed to obviate the dangers of a censorship system (App. A at 35), and it is obvious that §(D) does not fall within the limited class of exceptional cases which has sanctioned prior restraints. And, as will be seen, it cannot be demonstrated that §(D) serves any compelling federal interest. *See infra* at 15-21.

Finally the district court's Findings of Fact belie the majority's unsupported conclusion that §(D) has had only a tenuous effect on the plaintiffs. That court found that §(D) has substantially curtailed the solicitation activities of the plaintiffs (Findings 188; 197); has limited their ability "to raise voluntary funds for political purposes; [has] limited their ability to engage in protected political speech and association, and [has] limited the right of persons with similar or related interests to receive from the

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[20] *See* App. A at 34; New York Times v. United States, 403 U.S. 713, 714 (1971); *id.* at 730-31 (White, Stewart, J.J., concurring); *id.* at 725-26 (Brennan, J., concurring); Nebraska Press Association v. Stuart, *supra*, 427 U.S. at 563; Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553, 559 (1975). This Court's insistence on the presence of procedural safeguards has not been limited to obscenity cases. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Procunier v. Martinez, 416 U.S. 396, 417-19 (1974).

Plaintiffs communications expressing political ideas, opinions, views, and beliefs and thereby associate themselves with the Plaintiffs." (App. A at 34; Finding 199).[21]

Under these circumstances, there can be no doubt that the question of whether §(D) is a prior restraint is substantial.

B.

IN ADDITION TO BEING A PRIOR RESTRAINT, SECTION (D) OTHERWISE ABRIDGES THE FIRST AMENDMENT

It is fundamental that First Amendment protections reach beyond prior restraints, and that statutes which affect speech and associational rights may be unconstitutional even though they do not restrain in advance the exercise of those rights. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Smith* v. *Daily Mail Publishing Co.*, 442 U.S. 97 (1979). Such statutes, implicating as they do core First Amendment freedoms, are "subject to the most exacting scrutiny." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). *Accord Buckley* v. *Valeo*, supra, at 64-65.

In order for such a statute to withstand a First Amendment challenge, it is not enough to show that legislative action is related to the election process. For as *Buckley* itself teaches, that interest cannot be invoked as a talismanic incantation to support any exercise of power. Instead, it must be demonstrated that: the inhibitions on expressional and associational freedoms are *necessary* to further some compelling interest; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed to achieve the allegedly compelling ends are the least restrictive of associational freedoms; and that

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[21] *See* also App. A at 36 (Section (D) has "dramatically decreased the available pool of potential contributors.").

the benefit gained outweighs the harm to constitutionally protected rights.[22]

Despite the mandatory nature of these criteria, the majority made no attempt to determine whether they were satisfied by §(D). Instead, there is only the *ipse dixit* that §(D) does not violate the First Amendment since any abridgement of associational freedoms is "amply justified" by the "overriding [government] interest" in insuring the integrity of federal elections and the voluntariness of contributions. (App. A at 10; 12; 14).

In what follows, we shall demonstrate that §(D) is unnecessary to the achievement of either of these goals; that on the contrary, §(D) will erode the basis upon which *Buckley* sanctioned the Federal Election Campaign Act's contribution limitations and that it will give rise to the very coercion it purportedly was designed to dispel; that it is subversive of the goal of fostering individual responsibility and preserving the individual's confidence in government; and that it violates the least drastic alternative test. The obvious substantiality of these issues mandates review by this Court.

1.

Section (D) Unnecessarily Burdens First Amendment Freedoms And Subverts the Underlying Rationale of Buckley

The Federal Election Campaign Act and its various Amendments in 1974 and 1976, created an elaborate framework for the regulation of all phases of the election process. The Act has imposed pervasive disclosure and reporting requirements (§434), created substantial civil and criminal sanctions for violations of its provisions (§§ 437g, 441j; *see also* §§437d, 438(a)(9)), and has imposed specific

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[22] *See* App. A. at 35-36; Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); In Re Primus, 436 U.S. 412, 432-34 (1979).

limitations on the amount of money that can be contributed by political committees or individuals (§§441a, and b).

In addition, Congress, in the 1976 Amendments, enacted rigid and explicit "anti-proliferation" provisions "to prevent corporations, labor organizations, or other groups of persons from evading the [Act's] contribution limitations . . . ." (Conference Report No. 94-1057, accompanying S-3065, 4/28/76, at 58). The "anti-proliferation" provisions provide that, for purposes of the contribution limitations, all contributions made by political committees, established, financed, maintained or controlled by any corporation or union shall be considered to have been made by a single political committee. 2 U.S.C. §441a(a)(5). The Act also prohibits contributions through nominees (§441f) and contributions in currency (§441g). *See also* App. A at 40.

In light of this elaborate mechanism, it is idle to suggest that §(D) is necessary or has the capacity to achieve the goal of electoral integrity by insuring compliance with the Act's contribution limitations. Moreover, such a contention cannot be entertained in light of *Buckley* v. *Valeo, supra.* There this Court, in rejecting an almost identical argument, held that the contribution limitations, in conjunction with the disclosure requirements and the Act's criminal penalties, were sufficient safeguards against evasion of the Act's contribution limitations. 424 U.S. at 44-47; 55-56; and *id.* at 236 (Burger, C.J., concurring and dissenting). *See also* App. A at 40). If, prior to the enactment of the anti-proliferation provisions, the Act was adequate to prevent evasion of the contribution limitations, their addition surely makes unnecessary the censorship mandated by §(D).

The majority also failed to recognize that its decision was contrary to the doctrinal underpinnings of *Buckley* itself. In sustaining the Act's contribution limitations, the Court emphasized that the limitations did not affect the ability of candidates and political committees to solicit and

aggregate large sums of money; it merely required them to raise funds from a greater number of persons. *Id.* at 21-22; 28, n.31. (*See also* App. A at 36-37).

Buckley makes clear that its sustaining of the contribution limitations was, in substantial measure, bottomed on the fact that the overall quantum of funds available for political purposes would not be appreciably reduced, and thus there would be no material impact on or undermining of associational freedoms. *Id.* at 29. Indeed, the Court emphasized that while citizens were barred from making large individual contributions, they were free to associate through corporate and labor political action committees, which were then allowed to solicit freely. *Id.* at 28, n. 31.

As the minority persuasively demonstrated, the restrictions imposed by §(D) have eroded the foundation on which rested *Buckley's* imprimatur of the Act's contribution limitations. (App. A at 36). For as a result of §(D), the number of persons each plaintiff may legally solicit has been dramatically curtailed (App. A at 36-37; Finding 188), and the right of citizens to associate through the vehicle of political committees markedly abridged. (Finding 199). And, as a necessary consequence, the corresponding right of the plaintiff political action committees to provide a focal point for political association and to obtain voluntary contributions is diminished. *Id.*

2.

Section (D) Will Heighten Rather Than Reduce Coercion

The majority's second justification for the massive dislocation of First Amendment freedoms wrought by §(D) was the purported necessity of assuring the voluntariness of contributions. (App. A at 10). Careful analysis demonstrates that this unsupported contention cannot withstand scrutiny.

Underlying certain subparagraphs of §441b was Congress' desire to protect employees from the undercurrent of pressure which the Congress perceived to be latent in *direct solicitation* by their *own* corporate employers and union superiors. Indeed, the Conference Report accompanying the 1976 Amendments reveals that Congress perceived in such *direct* solicitation the need for imposing appropriate safeguards to insure against reprisals directed toward employees who do not contribute as much as the solicitor thinks appropriate.[23]

Congressional concern with direct corporate (and union) solicitation of its *own* employees (and members) is readily understandable, for the federal courts and the Congress have long perceived the immediate and direct economic dependence of the employee on his corporate employer or union superiors. (App. A at 37). And they have been sensitive to the possibility that such dependence could have a subtle impact on various decisions which the employee may be called upon to make. *See Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Gissel Packing Company*, 395 U.S. 575, 617 (1969).

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[23]To insure that contributions would be freely given, the Congress required that soliciting corporations inform their *own* executive and administrative employees of the political nature of the solicitation and of their right to refuse to contribute without reprisal. *See* 2 U.S.C. §441b(b)(3)(B) and (C); 122 Cong. Rec. 12,199 (daily ed. May 3, 1976) (remarks of Congressman Hayes) (H. R. Rep. on S-3065, Federal Election Campaign Act Amendments of 1976). In addition, to assure the anonymity of those who do not wish to respond or those who wish to respond with a small contribution, a corporation's bi-annual solicitation of *its* rank and file employees can be made only by mail addressed to employees at their residence and must be so designed that the soliciting corporation cannot determine who makes a contribution of $50.00 or less and who does not make any contribution. 2 U.S.C. §441b(b)(4)(B).

However, direct economic dependency of employees on their corporate employers is conspicuously absent in the context of trade association solicitation of a corporation's *stockholders*. It is also absent in the context of solicitation of the administrative and executive employees of an Association's corporate members. (App. A at 37-38). One searches the legislative history of the Act in vain for even a whisper of Congressional concern that trade association solicitation is somehow coercive. This absence of concern stands in stark contrast to Congress' preoccupation with direct corporate and union solicitation of their *own* employees and members.

By requiring corporate consent as a precondition to solicitation, § (D) has unnecessarily interposed the employer between the trade association and the prospective contributor and has thus "heigten[ed] rather than diminish[ed]" any coercive pressures which might exist. (App. A at 38). For "[e]xplicit corporate consent to trade association solicitations subtly, yet directly, would appear to suggest to employees that the employer favors a contribution."[24] (App. A at 38). *Compare NLRB* v. *Virginia Power Company*, 314 U.S. 469, 477 (1941); *NLRB* v. *Gissel Packing Company, supra* 395 U.S. at 617. In short, § (D) will result in the very evil it purportedly was designed to eradicate.

However, even if some minimal degree of coercion were found to inhere in trade association solicitation, § (D) would still be unconstitutional. For the method it has chosen to combat the supposed evil violates the principle that achievement of valid ends cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative

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[24] In one sense, §(D) deprives the potential contributor of any real freedom of choice, for if consent is unilaterally denied by the employer, the employee will have no choice to make.

abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *See* App. A at 36; *Wooley* v. *Maynard*, 430 U.S. 705, 716-17 (1977).

To satisfy the least drastic alternative test, § (D) would be required to mandate that denial of permission to solicit be predicated upon the prevention of coercion. As presently, written, however, § (D) allows a corporation to deny a trade association's request to solicit for *any reason*. An obviously less drastic and intrusive means of insuring freedom of choice is the establishment of a system of solicitation which either reminds the prospective contributor that he need not contribute, or that insures the anonymity of the contributor, or both. (App. A at 38). As noted earlier, the efficacy of such alternatives has been recognized by the Congress.[25]

Stripped of its pretensions, the majority's thesis is nothing more than paternalism in its worst form. For it assumes, contrary to the most basic tenents of the First Amendment, that our people are incapable of making volitional choices and that they need the paralyzing power of the corporate censor to protect them from a request for a political contribution. But "[t]he First Amendment rejects the 'highly patenalistic' approach of statutes like [§ (D)] which restrict what the people may hear." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791, n.31 (1976).

The majority also failed to recognize that statutes like the Federal Election Campaign Act were designed "not merely to prevent the subversion of the integrity of the electoral process. [Their] underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Auto Workers*, 352 U.S. 567, 575,

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[25] *Compare* Miranda v. Arizona, 384 U.S. 436 (1966).

590 (1957). This theme was echoed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), which reaffirmed the *Auto Workers'* formulation and, in addition, emphasized that "equally important" was the goal of "[p]reservation of the individual citizen's confidence in government. . . ." *Id.* at 788-89. Achievement of these goals is clearly not furthered by §(D).

C.

SECTION (D) INVIDIOUSLY DISCRIMINATES AGAINST TRADE ASSOCIATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Although the district court found that the restrictions of § (D) apply exclusively to solicitations undertaken by trade associations, that no comparable restraints are imposed on solicitations by independent, corporate and union PACs, and that these restrictions had substantially and adversely affected plaintiffs' solicitation activities (App. A at 44), the majority held that § (D) did not invidiously discriminate against trade associations. In support of this view, the majority argued that not only do incorporated trade associations have the same solicitation rights, *vis-a-vis* their *own* executives and stockholders as are enjoyed by any other corporation, but, in addition, are accorded by § (D) "an additional group of potential solicitees not available to other corporate entities."[26] (App. A at 17-18).

The majority sought to justify the disparity in treatment between trade association and union PACs with the facile conclusion that unions had a different relationship with their members than trade associations had with the executives and stockholders of their member corporations. (App. A at 18). The deficiencies in these arguments are manifold.

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[26](*i.e.* executive and administrative personnel and the stockholders of member corporations).

1.

Incorporated Trade Associations Do Not Enjoy the Same Solicitation Rights As Other Corporate Entities

In *Buckley* this Court held that even when a statute facially appears to be evenhanded, "[t]he appearance of fairness, however, may not reflect political reality." 424 U.S. at 31, n.33. As the minority demonstrated, this case presents precisely such a situation.

Unlike the situation that obtains with corporations organized for profit, most trade associations are not-for-profit corporations, having no stockholders, and exceedingly small executive and administrative staffs. Thus, the typical for-profit corporation, which is outside the scope of § (D), possesses a substantially greater solicitation pool than does an incorporated trade association. It is thus quixotic to suggest that trade associations are not treated differently than other corporate entities merely because the Act, facially, accords both equal solicitation rights regarding their *own* executives and stockholders. (App. A at 41-42).

Nor is the practical inequality in treatment attenuated because § 441b(b)(4)(C) facially accords trade associations the "right" to solicit their *individual* members. Since the membership of trade associations is comprised almost exclusively of corporations (which cannot make contributions (§ 441b) and thus cannot be solicited), the "right" to solicit individual members is illusory. And since most trade associations have few rank and file employees, the "right" to solicit their *own* rank and file is rendered meaningless. (App. A at 42).[27]

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[27] The majority's conclusion about the supposed equality between trade associations, corporations, membership organizations, and labor unions calls to mind Anatole France's insight in Le Lys Rouge; "The law in its majesty *equally* forbids the rich as well as the poor to sleep under bridges, to be in the streets, and to steal bread." (Emphasis supplied).

The untenability of the majority's arguments becomes even more apparent when applied to a federated trade association like plaintiff National Lumber and Building Materials Dealers Association ("NLBMDA") and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"). NLBMDA is an incorporated trade association to which belong 27 regional incorporated trade associations, which in turn have some 15,000 retail lumber and building materials dealers as members. Simply stated, it is an association of associations.

If NLBMDA's "members" are deemed to be the 27 regional associations, it is obvious that NLBMDA and other federated trade associations not only do not "have broad solicitation rights," (App. A at 17), they have virtually no solicitation rights. Like other incorporated trade associations, federated associations have no stockholders, exceedingly small executive and administrative staffs, and few, if any, rank and file employees. Thus, in practical application, their solicitation rights are not congruent with those of for-profit corporations.

More importantly, the supposed benefit accorded by § (D) to trade associations in the form of an "additional group of potential solicitees," (App. A at 17), is meaningless when considered in the context of federated associations. If NLBMDA's "members" are the 27 regional trade associations, the "additional group of potential solicitees" will not consist of any stockholders since incorporated trade associations are generally not-for-profit and have no stockholders. This leaves only the approximately 40 executive and administrative personnel of the 27 regional associations which belong to NLBMDA. (Finding 61).

If it be true that "[r]ealities must dominate judgment," *Appalachian Coal Co.* v. *United States*, 288 U.S. 344, 360 (1933), the minority properly concluded that the differ-

ences in structure between trade associations and other entities "should give rise to broadened, not restricted solicitation rights for trade associations because the statutory avenues of solicitation available to corporations and membership organizations prove fruitless when applied to incorporated associations." (App. A at 43).

2.

Trade Associations Do Not Have the Same Solicitation Rights As Unions

The invidiously discriminatory nature of § (D) is dramatically illustrated by a comparison of the solicitation rights accorded federated trade associations with those accorded unions having a federated structure. Federated unions, such as the AFL-CIO, are composed of a number of International Unions, which in turn, are composed of numerous Locals. While the organizational structure of federated unions is identical to that of federated trade associations, the former are accorded infinitely greater solicitation rights.

For example, the AFL-CIO's PAC can solicit all individual members of all the Locals comprising all of the Internationals with unlimited frequency and without prior permission from the Internationals or the Locals.[28] These solicitations can be independently conducted regardless of whether the PACs of the International Unions have solicited the individual members of the Locals. *See* 2 C.F.R. §114.5(g). *See also* App. A at 43. Finally, the PACs of the various Internationals are not deemed "affiliated" with the AFL-CIO's PAC for purposes of the contribution limitations of the Act. Thus, contributions from the AFL-CIO's PAC are not aggregated with contributions of

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[28]For solicitations purposes, the members of the various Locals are also members of the AFL-CIO. *See* 2 C.F.R. §114.1(e) and App. A at 43.

the PACs of the International Unions. *See* 2 C.F.R. §110.3(a)(1)(ii).

The treatment accorded federated trade associations by the Act differs drastically. The national association cannot freely solicit the executive and administrative personnel of the corporations comprising the membership of the regional associations which belong to the national association. It must either conduct a joint solicitation with its regional "member" association or have delegated to it those "members'" solicitation rights. (App. A at 43). Regardless of the alternative chosen by the national association, there can be no solicitation without the prior written permission of the regional associations' corporate members and without compliance with the other restrictions of § (D). Perhaps the most glaring disparity in treatment is that, unlike the situation which obtains with federated unions, a federated trade association's regional 'member"-associations are deemed to be affiliated with the national association for purposes of the Act's contribution limitations. *See* 2 U.S.C. §441(a)(5); 2 C.F.R. 110.3 (a)(1)(ii)(D).

The avowed purpose of the disparate treatment between union and trade association PACs is to limit the latters' fundraising potential.[29] Such a purpose cannot survive constitutional scrutiny, for the First Amendment condemns attempts to "[e]qualize the relative ability of individuals and groups to influence the outcome of elections. . . ." The concept "that government may restrict the speech [or, *a fortiori*, the right of association] of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo, supra*, 424 U.S. at 48-49.

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[29]In Advisory Opinion 1978-17, the FEC stated that "[b]y requiring advance solicitation approval, and limiting approval by corporate members of a trade association to one trade association per year, the fundraising potential of the trade association is limited."

The exacting analysis required by the Due Process Clause of the Fifth Amendment leads to the same conclusion as the First Amendment analysis: there is absent any compelling interest warranting the invidiousness of § (D), and the mechanism chosen by that section to achieve its goals are the antithesis of the least restrictive means, closely tailored to avoid unnecessary abridgement of First Amendment freedoms.[30] Consequently, § (D) is violative of the Due Process Clause.

3.

Trade Associations Have the Constitutional Right To Solicit Contributions From Those Having An Affinity of Interest With Them

The majority sought support for these conclusions in the nature of the relationship which was thought to exist between trade associations and the stockholders and the executive staffs of their member corporations. Unlike a union, which "represents" its members, a trade association, according to the majority, does not "represent" the stockholders and executives of its corporate members. Hence, the majority concluded, there is absent the commonality or affinity of interest which characterizes a union's relationship with its members. It was this supposed absence of shared purpose which the majority thought warranted the differences in treatment accorded trade association PACs by §(D). (App. A at 19).

The majority's *a priori* determination that only unions and their members and corporations and their executives and stockholders have a commonality of interest is not

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[30]The criteria employed in Fifth Amendment Due Process [Equal Protection] analysis is the same as that employed in First Amendment cases. *See supra* at 14. *See* Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Police Department v. Mosley, 408 U.S. 92, 95 (1972).

only analytically indefensible (See App. A at 33; 38; 44 n.11), but is contrary to the decisions of this Court. From the atmosphere and emanations of *United States* v. *CIO*, 335 U.S. 106 (1943), and *United States* v. *Auto Workers*, 352 U.S. 567 (1957), there emerges with unmistakable clarity a recognition that the First Amendment cannot be canalized within the narrow banks of union membership and corporate ownership or employment. Rather *CIO* and *Auto Workers* teach that the First Amendment accords to corporations and unions the right to communicate not only with their members, stockholders, and employees, but with "customers"[31] and others "affiliated with" them—[32] in short, with those sharing a commonality of interest or purpose.

But "*[t]his reasoning, of course applies as well to solicitations for contributions to voluntary political funds.*" *Pipefitters* v. *United States*, 407 U.S. 385, 431, n.42 (1972) (Emphasis supplied). That is, the same justifications that allow use of corporate (and union) funds to communicate on political matters with those having some appropriately close relationship, likewise allow their use to defer the costs of PAC solicitation. Such expenditures are not directed to "the public at large" and, thus, do not contravene the purposes underlying the Corrupt Practices Act and its successor, the Federal Election Campaign Act.[33]

Since § (D) imposes serious restraints on the speech and associational freedoms of those having an affinity of interest, "the gravest doubt [must] arise . . . as to its constitutionality." *United States* v. *CIO*, *supra*, 335 U.S. at 121.

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[31] United States v. CIO, *supra*, 335 U.S. at 121.

[32] United States v. Auto Workers, *supra*, 352 U.S. at 592. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 808 (1978) (White, J., dissenting).

[33] *See* United States v. Auto Workers, supra, 352 U.S. at 584-85, 587, 589, 592; Thornburg opinion letter, App. D at 53.

D.

SECTION (D) IS VAGUE AND OVERBROAD

For more than a century there has been virtual unanimity of judicial opinion that where the word "solicitation" is used in a statute without being defined, it will be accorded its commonly understood dictionary definition: to importune, entreat, implore, ask, attempt to obtain—in short, to intentionally and specifically request a particular thing. *See e.g., Laurel* v. *Superior Court for Los Angeles County,* 255 Cal. App.2d 292, 63 Cal. Rptr. 114, 118 (1976).

The drafters of the Act, however, have disavowed the dictionary definition in favor of a broad sweeping concept which includes "anything which fairly could be deemed a request for a contribution." (*See* FEC Advisory Opinion 1978-83 CCH Federal Election Campaign Financing Guide, ¶ 5382). A statute of such protean contours is incompatible with the First Amendment, for it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn from his intention and meaning." This the Constitution will not allow. *Thomas* v. *Collins,* 323 U.S. 516, 535 (1944). *See also Buckley* v. *Valeo, supra,* 424 U.S. at 42-43.

While implicitly acknowledging that this was indeed the definition intended by the Congress (App. A at 21), the court of appeals found the Act neither vague nor overbroad.[34] The court however made no attempt to demonstrate that such a sweeping definition was constitutionally permissible. Instead, it merely adverted to cases sustaining, against vagueness and overbreadth attacks, statutes which have used the term solicitation without explicit definition. (App. A at 20). Since, however, in those

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[34]While joining in this conclusion, Chief Judge Fairchild and Judges Pell and Bauer held that the FEC had construed the term so broadly that there was a chilling effect on protected speech. (App. A at 31, n.3).

cases solicitation was intended to have its customary dictionary definition, they do not support the court's ultimate conclusion.

The court also ignored the recent holding of the District of Columbia Circuit that, as used in the Act, the term "solicitation" is "inherently vague", and "a crucial ambiguity inheres in the word 'solicit'. . . ." *See Martin Tractor* v. *FEC*, 627 F.2d 375 (D.C. Cir.), *cert. denied* ..... U.S. ..... (1980). An examination of the FEC's advisory opinions confirms the validity of the D.C. Circuit's conclusion and demonstrates that the limitless sweep of the definition has made it impossible to ascertain what speech will constitute a solicitation. Additionally, the statutory vagueness and overbreadth have allowed the FEC to assume the role of a super-governmental censor, regulating arbitrarily the political speech and association of citizens in every part of the Nation.

For example, in Advisory Opinion 1979-13, the FEC ruled that an article proposed for inclusion in a corporate PAC's regular newsletter would constitute a solicitation "since it describes [the PAC's] activities and encourages participation in [the PAC] by commending the enthusiasm of employees whose participation in [the PAC] has indicated awareness of the connection between their welfare and government policies toward business." (App. E at 58-63). Thus, the article could not be circulated to anyone (including retired executives) who was not a corporate stockholder or executive and who had not been approved for solicitation by the company as required by § (D). Not only is AO 1979-13 predicated upon an atavistic and discredited conception of the First Amendment,[35]

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[35]Since Mr. Justice Holmes' classic dissent in Gitlow v. New York, 268 U.S. 652, 672 (1925), the expression of ideas and opinion is constitutionally protected even if enthusiastically advanced. *See* Buckley v. Valeo, *supra*, 424 U.S. at 43; FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979).

but it demonstrates the impossibility of determining in advance of action, what speech will be deemed a "solicitation."

The vagueness and overbreadth of § (D) have allowed the FEC to prohibit, as a "solicitation," an announcement about the mere existence of a fundraising event (AO 1976-27 and 1976-96, CCH Federal Election Campaign Financing Guide ¶¶5213, 5227), and to require that conspicuous signs and other promotional activity to be used at a PAC booth at a convention be displayed and conducted so that only properly authorized people are exposed. (AO 1978-83; AO 1978-17—CCH, *supra*, at ¶¶ 5382, 5307).

The fact that "it was permissible for the [FEC] to come out differently in these and other cases" (App. A at 22) scarcely supports the conclusion that § (D) is neither vague nor overbroad. On the contrary, it is precisely because the statute gives the FEC such arbitrary latitude that it must be declared unconstitutional.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary briefing and argument.

Respectfully submitted,

JEFFREY COLE

Counsel for Appellants

Of Counsel:
STANLEY T. KALECZYC
National Chamber Litigation
Center, Inc.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1146

BREAD POLITICAL ACTION COMMITTEE, et al.,

Plaintiffs,

v.

THE FEDERAL ELECTION COMMISSION, et al.,

Defendants.

Proceeding on Order Certifying Constitutional Questions by the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-947—Prentice H. Marshall, *Judge.*

Argued En Banc June 16, 1980—Decided December 5, 1980

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, SPRECHER, BAUER, WOOD and CUDAHY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this action, we are presented with four questions concerning the constitutionality of 2 U.S.C. § 441b(b)(4)(D), a provision of the Federal Election Campaign Act ("Act") (2 U.S.C. §§ 431 *et seq.*).[1]

[1] Throughout this opinion we will refer to various sections of the Act by their numbers in Title 2 U.S.C. rather than by their statutory numbers.

The questions come to us on certification from the district court pursuant to 2 U.S.C. § 437h.

I. *Introduction*

In March 1977, plaintiffs brought this suit under 2 U.S.C. § 437h[2] seeking a declaration that Section 441b(b)(4)(D) is unconstitutional and asking the district court to grant a permanent injunction against enforcement thereof. Plaintiffs are the National Restaurant Association and the National Lumber and Building Material Dealers Association, both incorporated trade associations, and the Bread Political Action Committee, the Restaurateurs Political Action Committee and the Lumber Political Action Committees. The three plaintiff political action committees were organized respectively by the American Bakers Association, the National Restaurant Association and the National Lumber and Building Material Dealers as separate

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[2] Section 437h provides:

"(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"(b) Notwithstanding any provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

"(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section."

segregated political action funds and were registered with the Federal Election Commission pursuant to 2 U.S.C. § 433. Plaintiffs named as defendants the Federal Election Commission ("Commission"), its eight members and, because he is empowered to take appropriate action on the Commission's referrals of apparent statutory violations, the Attorney General of the United States (Plaintiffs' App. 17).

The challenged provision is one of the 1976 permissive exceptions to Section 441b(a) of the Act, which prohibits contributions or expenditures by "any corporation whatever" or "any labor organization" in connection with a federal election. But an exclusion, added by the amendment to the Act in 1972 and now contained in Section 441b (b)(2)(C), allows corporations and labor organizations to use general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund[3] to be utilized for political purposes" by the parent organization. These segregated funds may be used to make contributions to candidates in federal elections subject only to restrictions imposed elsewhere in the Act and not in issue here.

A segregated political fund and its parent organization are restricted, however, as to whom they may solicit for fund contributions. Section 441b(b)(4)(A)(i) makes it unlawful for a corporation or its segregated political fund

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[3] The Act now provides that separate segregated funds are "political committees." 2 U.S.C. § 431 as amended by Pub. L. No. 96-187 (93 Stat. 1339). As the Supreme Court noted in *Pipefitters* v. *United States*, 407 U.S. 385, the separate segregated funds are not "meaningfully 'separate' from the sponsoring union [or trade association] in any way other than 'segregated' ". 407 U.S. at 426. The separation required by the Act is a separate bank account and a separate ledger. 407 U.S. at 413-417. In short, the separate segregated funds are simply political arms of the parent organizations.

to solicit contributions from anyone other than its stockholders and their families or its executive or administrative personnel and their families, while Section 441b(b)(4)(A)(ii) makes it unlawful for a labor organization or its segregated political fund to solicit contributions from any person other than its members and their families. These prohibitions are in turn subject to three exceptions added in 1976. Paragraph (B) of Section 441b(b)(4) permits corporations to make two annual written solicitations of their rank-and-file employees and their families. See 11 C.F.R. § 111.6(a). Paragraph (B) also permits labor organizations representing corporate unit employees to make two annual written solicitations of the corporate shareholders and all corporate employees, whether members of the union or not. See 11 C.F.R. § 114.6(b). Paragraph (C) permits membership organizations, cooperatives and corporations without capital stock or their segregated political funds to solicit contributions from their members.

The last exception, paragraph (D) of Section 441b(b)(4), is the focus of the present litigation. This provision permits a trade association or its segregated political fund to solicit contributions from the stockholders and executive and administrative personnel of its member corporations and their families provided that such solicitation has been approved by the member corporation and the member corporation has not approved a solicitation by any other trade association for the same calendar year. The full text of Section 441b(b)(4)(D) is as follows:

> "This paragraph [Paragraph (A) of Section 441b(b)(4)] shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the

> extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year."

All of Section 441b is set out in the Appendix hereto.

In September 1977, pursuant to 2 U.S.C. § 437h, plaintiffs filed a motion below for immediate district court certification to us of certain questions they had submitted to that court pertaining to the constitutionality of the foregoing provision. This motion was denied two days thereafter, and on October 7 the district court denied plaintiffs' motion for a preliminary injunction. We granted leave to appeal on December 21, 1977. On appeal, the principal question before us was whether the five plaintiffs had standing to invoke 2 U.S.C. § 437h (set out in note 2 *supra*).

On January 12, 1979, this Court decided that plaintiffs do have standing to invoke Section 437h and thus have all their constitutional challenges certified by the district court for initial review by this Court sitting *en banc*. *Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29. Therefore, the cause was remanded to the district court, which at plaintiffs' request subsequently certified the following four questions[4] to us:

> "1. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States of America?

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[4] The district court polished plaintiffs' draft questions into their present form (Com'n App. 45a-46a).

"2. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

"3. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

"4. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'trade association,' as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States?"

At the same time, the court handed down 215 findings of fact drawn from a joint stipulation of facts and the parties' proposed findings (Com'n App. 47a-111a). Their correctness is not before us. Before answering the questions posed, three jurisdictional arguments of the Commission must be addressed.

II. *Standing, Case or Controversy, and Breadth of Certified Questions*

The Commission has reargued that the plaintiffs have no standing under Section 437h. This question was decided adversely to the Commission by a panel of this Court in January 1979 (591 F.2d 29). We decline to overrule that decision and note that the Ninth Circuit has agreed with us by holding that the California Medical Association and its political action committee had sufficient standing to obtain a judicial ruling on constitutional questions certified under Section 437h. *California Medical Association,*

et al. v. *Federal Election Commission, et al.*, ... F.2d ....., ... (9th Cir. No. 79-4426, decided May 23, 1980) slip op. 2, appeal-Supreme Court jurisdiction reserved until hearing on merits, 49 LW 3245.

The Commission also contends, although more obliquely than it did in the district court, that in answering the four certified questions we would be rendering an advisory opinion rather than deciding a case or controversy as required by Article III of the Constitution (Br. 53, 67-68). The district court's exhaustive findings of fact (Com'n App. 47a-111a), uncontroverted by the Commission, are clear proof why this is a live controversy and in no way mooted. The plaintiffs and defendants remain poles apart as to the meaning and constitutionality of Section 441b(b)(4)(D). Until that controversy is resolved, plaintiffs will continue to be threatened by defendants as to the legality of their present and proposed activities. Accordingly, any argument based on a lack of case or controversy required by Article III of the Constitution is frivolous. This same argument was made in the Commission's 1978 brief (at p. 5) and therefore must have been decided (at least *sub silentio*) against the Commission in our previous *Bread Political Action Committee* case; otherwise the panel would not have remanded the cause so that the district court could certify the constitutional questions (591 F.2d at 36). In any event, the question was decided adversely to the Commission in *Buckley* v. *Valeo*, 424 U.S. 1, 12, and in *California Medical Association, supra*.[5]

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[5] Even the concurring and dissenting opinion of Judge Wallace in *California Medical Association, supra*, did not accept the Commission's case or controversy argument See pp. 11-13 of his slip op. Moreover, he expressly disavowed the D.C. Circuit opinions taking that tack, noting that they ignored *Buckley* v. *Valeo*, 424 U.S. 1 at 11-12. See note 11 of his opinion. The panel of this Court

(footnote continued)

The Commission has also submitted that Section 437h must be read narrowly and may only be used to challenge facially unconstitutional provisions of the Act (Br. 9-11). We again disagree. Section 437h empowers federal appellate courts "to construe the constitutionality of any provision of this Act" by declaratory judgment. This provision does not limit certified questions to "appropriate questions" of constitutionality as the Commission urged in 1978 (Br. 9, 10, 13) and again now (Br. 11-12). Rather, Section 437h requires the district courts to certify "all questions of constitutionality of this Act" to the various circuit courts of appeals. The term "appropriate" as used in Section 437h modifies "actions" and not "questions of constitutionality" as the Commission would have it. *Bread Political Action Committee* v. *Federal Election Commis-*

(footnote continued)

that decided the earlier *Bread Political Action Committee* case was also critical of the D.C. Circuit's reasoning in related cases. 591 F.2d at 35 n. 11. The Commission relies here on *Martin Tractor Co.* v. *Federal Election Commission*, ___ F.2d ___ (D.C. Cir. No. 78-2080 and 79-1027, decided May 8, 1980), certiorari denied *sub nom. National Chamber Alliance for Politics* v. *Federal Election Commission*, 49 LW 3332, which was decided a fortnight before the *California Medical Association* case but not brought to the Ninth Circuit's attention. We are not convinced that *Martin Tractor* is contrary to the position we have taken here in that the court there appears to have based its dismissal for lack of case or controversy largely on the easy availability of advisory opinions from the Commission to eliminate or at least focus the questions presented for review while in this case the questions are already clearly focused. But to the extent that *Martin Tractor* is not distinguishable we are, like the Ninth Circuit, in disagreement with the D.C. Circuit.

On October 6, 1980, the Supreme Court ruled that further consideration of the question of its jurisdiction over the *California Medical Association* case is postponed until the hearing of the appeal on the merits (No. 79-1952, October Term 1980). 49 LW 3245.

sion, 591 F.2d 29 (7th Cir. 1979). Therefore, we adhere to our previous decision and the majority opinion in *California Medical Association, supra*, at slip op. 19, in refusing to limit our review to the facial constitutionality of provisions of the Federal Election Campaign Act or, as Judge Wallace would hold (at pp. 4-9 of his concurring and dissenting slip op.), to questions of exceptional importance as to its constitutionality.[6]

III. *Plaintiffs' Right of Assembly Has Not Been Impermissibly Infringed*

The first question certified to us is "[w]hether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States of America." In support of an affirmative answer to this question, plaintiffs first argue that Section 441b(b)(4)(D) is an impermissible prior restraint (an issue not specifically certified)[7] or, in the alternative, an unjustifiable in-

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[6] *Mott* v. *Federal Election Commission*, 494 F. Supp. 131 (D. D.C. 1980) is distinguishable. In that case, the district court dismissed the complaint of one plaintiff on ripeness grounds and the complaint of the other plaintiffs on the merits because the questions raised were answered by *Buckley* v. *Valeo, supra*. In so doing, it took the position that Section 437h requires certification only of "substantial" constitutional questions, holding that unripe constitutional questions and constitutional questions that had already been decided can be dismissed without certification. Because the questions presented here are "substantial," we need not decide whether Section 437h requires certification of all constitutional questions regardless of their substantiality.

[7] We agree with the dissent herein (p. 29 *infra* and n. 2 of dissent) that we should address the prior restraint issue since plaintiffs raised it below and Judge Marshall at least referred to the First Amendment in his first question addressed to us.

fringement on their associational freedoms. We are unpersuaded by these arguments and answer the first question in the negative.

It is, of course, well established that association and solicitation are forms of political expression protected under the First Amendment, *N.A.A.C.P.* v. *Button*, 371 U.S. 416; *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620. But these activities are not protected absolutely and may be subject to governmental regulation where there is an overriding state interest in such regulation. *Buckley* v. *Valeo*, 424 U.S. 1 (*per curiam*).

The transcedent legislative objective served by the Federal Election Campaign Act is the elimination of corruption and the appearance of corruption in the federal election process. *Id.* The restrictions imposed by Section 441b of the Act on labor organizations and corporations, including incorporated trade associations, are designed to serve both this objective and the additional objective of protecting individuals from economic coercion. *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-584; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 113.

The challenged provision is, as noted, one of the exceptions to the broad prohibition of Section 441b(a) against contributions and expenditures by corporations and labor organizations in connection with federal elections. Section 441b(a) clearly withstands First Amendment attack. *United States* v. *Boyle*, 482 F.2d 755, 763-765 (D.C. Cir. 1973), certiorari denied, 414 U.S. 1076; *United States* v. *Chestnut*, 533 F.2d 40, 50-51 (2d Cir. 1976). The 1972 exclusion in Section 441b(b)(2)(C) permits the limited use of corporate and union general treasury funds to establish political action committees denominated "separate segre-

gated funds" in the Act. See note 3 *supra*. This exclusion is clearly intended to strike a balance between the objectives served by banning the use of corporate and union funds in federal elections and permitting wholly unrestricted association between the regulated groups and those individuals in a direct relationship with them. 117 Cong. Rec. 43, 379-381 (1971). The 1976 exceptions set forth in paragraphs (A), (B), (C) and (D) of Section 441b(b)(4) simply define that balance.

Corporations, including incorporated trade associations, are allowed unlimited solicitation of their stockholders, if any, and their families and their administrative or executive personnel and their families. (2 U.S.C. § 441b(b)(4)(A); 11 C.F.R. § 114.5(g)(1).) Labor organizations, membership organizations, co-operatives and corporations without capital stock, including trade associations, are permitted unlimited solicitation of their members and, in the case of unions, their families (2 U.S.C. § 441b(b)(4)(A) and (C); 11 C.F.R. §§ 114.5(g)(2) and 114.7(a).) In short, there is no restriction on the number of times a regulated group may solicit contributions to its political action committee from those in direct relationship to it.

In addition, corporations, including incorporated trade associations, are permitted to make two annual written solicitations of their rank-and-file employees. (2 U.S.C. § 441b(b)(4)(B); see also 11 C.F.R. § 114.6(a).) Unions are permitted analogous contacts with employees of a corporation in which the union represents members working for the corporation. (2 U.S.C. § 441b(b)(4)(B); see also 11 C.F.R. § 114.6(b)).

Solicitations beyond those just described are, with one further exception, prohibited altogether by paragraph (A) of Section 441b(b)(4). That exception is the challenged

provision, paragraph (D) of Section 441b(b)(4), which permits trade associations to solicit any number of times the shareholders and executive or administrative personnel (and families thereof) of their member corporations if the member corporation has approved the solicitations and has not approved any other trade association's solicitation for the same calendar year. See 11 C.F.R. § 114.8(c) and (e). It is obvious that paragraph (D) is intended to provide trade associations with a potential pool of solicitees otherwise forbidden them under paragraphs (A), (B), and (C).

Plaintiffs do not challenge the validity of paragraph (A), (B), or (C), and we note that paragraphs (C) and (A)(i) were recently upheld against First Amendment challenges similar to those brought here against paragraph (D). *Federal Election Commission* v. *National Right to Work Committee*, ... F.Supp. ..... (D.D.C. Nos. 77-2175 and 78-0315, decided April 24, 1980). There Judge Parker concluded that "to the extent the statute restricted plaintiffs' ability to solicit, it represents a marginal infringement on these rights and is fully justified by the need to protect the electoral process." Slip op. at 24.[8]

Plaintiffs' complaint is that the additional avenue of solicitation allowed them under paragraph (D) is too limited to withstand constitutional scrutiny. We disagree. Nothing in Section 441b(b)(4)(D) limits the expression or dissemination of political ideas and information either to the individuals described in the Section or to any other

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[8] See also *California Medical Association* v. *Federal Election Commission*, ___ F.2d ___ (9th Cir. No. 79-4426, decided May 23, 1980), appeal-Supreme Court jurisdiction reserved until hearing on merits, 49 LW 3245, in which it was held that Section 441b(b)(2)(C) does not contravene the First or Fifth Amendments.

individual. Indeed, there has been no showing that this provision has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political action committees. To the contrary, Judge Marshall's uncontested findings of fact (Com'n App. 47a-111a) establish that plaintiffs are engaged on a daily basis and unimpeded by paragraph (D) in a broad range of First Amendment activities. Nor does Section 441b(b)(4)(D) prohibit, as plaintiffs suggest, trade associations from joining the shareholders and executive or administrative employees of its member corporations to it in common cause. They are free to solicit any individual, including those just described, to join their trade associations.[9] Once an individual joins a trade association, he or she may be solicited for contributions without limitation under Section 441b(b)(4)(C). The political committees are of course free to accept contributions made to them by shareholders and employees of member corporations without solicitation on the trade associations' or their political committees' part.

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[9] The dissent takes the view that this activity is effectively precluded because of the Commission's broad construction of the term "solicitation." (pp. 31-32, *infra*). The Act, however, clearly prohibits the solicitation of contributions to the separate segregated funds, not solicitation of membership in the trade associations themselves. The Commission's Advisory Opinion 1979-13 prohibits neither solicitation of memberships nor solicitation of contributions to separate segregated funds by trade association members. To the contrary, it permits solicitation of members. Plaintiffs' App. 330; CCH Federal Election Campaign Financing Guide ¶ 5403 at 10,419. Moreover, it seems to us that the thrust of the dissent's position is that the vagueness or overbreadth of the term "solicitation" has a "chilling effect" on plaintiffs' efforts to gather like-minded individuals into its fold. Yet the dissent concurs in Part V, which holds that the term is neither vague nor overbroad.

Finally, trade associations and their political committees are free to urge any individual to support or oppose a particular candidate and even to contribute directly to a candidate's campaign fund.

What plaintiffs cannot do is freely solicit contributions from the shareholders and employees of their member corporations for the use of their own political committees. Because there is no limit on the number of trade associations to which a corporation may belong, the restrictions in Section 441b(b)(4)(D) serve to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections. The effect of the dissent's disposition invalidating Section 441b (b)(4)(D) would be, of course, to make any solicitation of its corporate members' shareholders and administrative/executive personnel unlawful because such solicitations are prohibited under Section 441b(b)(4)(A) except as provided in Section 441b(b)(4)(D). To the extent that the corporate approval requirement has a "prior restraining" effect on the solicitations only allowed by virtue of Section 441b(b)(4)(D) itself, we think it both tenuous and amply justified by the necessity of providing a mechanism to prevent the exception from swallowing the whole.[10]

Plaintiffs' reliance on *Village of Schaumburg, supra,* is misplaced. There an ordinance restricting door-to-door and on-street solicitations for charitable contributions was struck down for overbreadth. The Supreme Court explicitly recognized that "[s]oliciting financial support is undoubtedly subject to reasonable regulation," but found the ordinance in question too broadly framed because it pro-

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[10] We of course do not hold that subsection (D) does not have any restraining effect as the dissent infers (at pp. 30-31, *infra*).

hibited legitimate political advocacy as well as the fraudulent solicitation it was intended to prevent. 400 U.S. at 632. In the instant case, the governmental objective of protecting the electoral process is, to begin with, much weightier than guarding against fraudulent solicitations for charity. More importantly, however, the provision here is not overbroad. To the contrary, it is a very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest and jealously guarded First Amendment freedoms. Cf. *California Medical Association* v. *Federal Election Commission, supra,* note 5; *Federal Election Commission* v. *National Right to Work Committee, supra.*

Consolidated Edison Co. v. *Public Service Commission* ..... U.S. ....., 48 LW 4776 (June 20, 1980), and *First National Bank* v. *Bellotti,* 435 U.S. 765, are also unsupportive of plaintiffs' cause. The former did not deal with money solicitations for elections and is inapt. In the latter, the Supreme Court invalidated a Massachusetts criminal statute prohibiting certain business corporations from making contributions or expenditures to influence referenda. Here we are concerned with Congressional opposition to excessive spending in connection with candidate elections. The Supreme Court noted the distinction: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections • • • simply is not present in a popular vote on a public issue." 435 U.S. at 790.

The cases dealing with the Federal Election Campaign Act are the cases in point. The leading case is, of course, *Buckley* v. *Valeo, supra.* In *Buckley,* the Supreme Court upheld, *inter alia,* ceilings on campaign contributions which clearly have far greater impact on plaintiffs' fund-raising ability than the minor restriction in issue here. Thus in

accord with *Buckley* and the cases noted upholding other provisions of Section 441b, we conclude that Section 441b (b)(4)(D) does not impermissibly infringe plaintiffs' right of assembly.[11] Realistically Congress cannot be expected to draw the perfect law envisioned by the dissent (at p. 38 *infra*), but adequate procedural safeguards against improper sanctions are available through the established Advisory Opinion machinery contained in Section 437f which immunize those persons who obtain favorable opinions from the Commission and also those whose activity is materially indistinguishable.

IV. *Plaintiffs' Right to Liberty Under the Due Process Clause of the Fifth Amendment Has Not Been Violated*

The second question certified to us is "[w]hether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States." We again answer in the negative.

Plaintiffs' argument on this issue is that the equal protection guarantee subsumed in the Fifth Amendment has been violated because corporations and labor unions may under paragraphs (A) and (B) of Section 441b(b)(4) solicit the permissible solicitees without prior approval of

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[11] Both certified questions one and two refer to the constitutionality of Section 441b(b)(4)(D) "facially and as applied." The only "application" we have discovered comes from the Commission's statutory construction expressed in its brief and at oral argument. Since the parties have not separately treated the "as applied" facet, we will refrain from discussing it in any vein except to state that we find no First or Fifth Amendment unconstitutionality in the Commission's construction of the statute, which will presumably be followed when the Commission applies this Section.

anyone while paragraph (D) requires trade associations to obtain prior approval from a member corporation before soliciting the shareholders or executive or administrative employees of that member corporation. This argument is largely premised, however, on a misreading of the statute.

It is simply not correct that plaintiffs are prohibited by paragraph (D), as they claim, from soliciting anyone other than the shareholders or executive or administrative employees of their membership corporations (Plaintiffs' Br. at 88). Both the literal statutory language and the Commission's regulations interpreting the statute indicate clearly that paragraphs (A), (B), (C) and (D) are not parallel provisions, each addressed to a different regulated group. Incorporated trade associations, because they are corporations, have precisely the same solicitation rights under paragraphs (A) and (B) as do other corporations. 11 C.F.R. § 114.8(i)(2). Moreover, trade associations are also membership organizations or corporations without capital stock and are therefore provided precisely the same solicitation rights as they have under paragraph (C). 11 C.F.R. § 114.7(c). Finally, trade associations are provided under paragraph (D) with an additional group of potential solicitees. 11 C.F.R. § 114.8(c).

Federated trade associations also have broad solicitation rights. A federation of trade associations may solicit its own shareholders (if any), employees and members in accordance with the rules just described. A trade association may also delegate its own solicitation rights to a federation (11 C.F.R. § 114.8(g)(1)(i) or conduct a joint solicitation with the federation (11 C.F.R. § 114.8(g)(1)(ii)), thereby allowing the federation to solicit the noncorporate business and individual members of the individual trade association; the shareholders, executive or

administrative personnel and their families of the individual trade association; and the shareholders and executive or administrative personnel and their families of the corporate members (with approval) of the individual trade association. In addition, a federated trade association may, subject to the same rules as those applied to international unions and their constituent locals, solicit the individual and non-corporate members of their regional, state and local affiliates (11 C.F.R. § 114.8(g)(1)) and the shareholders and executive and administrative personnel and their families of corporate members of such affiliates. 11 C.F.R. § 114.8(g)(2). Thus to the extent that trade associations are treated differently from other corporations and other membership organizations, the difference lies in the fact that trade associations are not limited as are the others to soliciting their own shareholders, employees or members.[12]

Furthermore, the somewhat dissimilar treatment of corporations, labor organizations, membership organizations and trade associations under Section 441b(b)(4) follows from the rather obvious facts that each of the different groups has a different structure and a different kind of constituency and that each requires somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the Fifth Amendment's equal protection provision. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98-99. It is important to keep in mind that the restrictions in issue here apply only where a trade association employs

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[12] Labor organizations are permitted one solicitation contact outside their membership. This is the rather limited right to solicit by mail twice annually the shareholders and non-member employees of corporations some of whose employees they represent.

corporate funds to undertake its solicitations. The same individuals who organize these political committees are free to establish a political committee independent of, rather than merely segregated from, the corporate treasury and corporate funds and thereby be free to solicit "the world." The reason Congress chose to allow trade associations to solicit the stockholders and executive or administrative employees (and their families) of member corporations (with their approval)[13] is undoubtedly because the member corporations themselves cannot make political contributions *per se* to the trade association's political committee. 2 U.S.C. § 441b(a). At the same time, the restrictions placed on this potential pool of solicitees serves, as we have said earlier, to prevent the exception from swallowing the whole.

Finally, the relationship that obtains between a trade association and the employees of its member corporations differs significantly from that existing between union members and their unions. Individuals join with other individuals in common cause as members of their union, and the union thus becomes their representative organization. A trade association is also a representative, membership organization, but it exists to promote the interests of its corporate and individual members, not the interests of the employees of its corporate members. Because the corporate employees are neither employed by nor represented by the trade associations, any equal protection comparison between the activities available to trade associations with respect to the employees of their corporate members with those available to labor organizations with respect to their

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[13] The record does not show that such approval "is generally refused" as the dissent would speculate (at pp. 42-43 *infra*) or that plaintiffs do not seek to solicit all corporate employees because of lack of commonality of interest (n.10 at p. 44 *infra*).

membership or the empolyers of their membership runs afoul of plaintiffs' failure to demonstrate how trade associations and labor organizations are "similarly situated" parties.[14] Accordingly, we conclude that Section 441b(b)(4)(D) does not deprive plaintiffs of liberty without due process in violation of the Fifth Amendment.[15]

V. *It Is Unnecessary for Section 441b(b)(4)(D) to Define "soliciting contributions"*

The third question certified to us is as follows:

> "Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?"

The phrase "soliciting contributions" is not unconstitutionally vague since people "of common intelligence" need not "necessarily guess at its meaning and differ as to its application * * *." *Baggett* v. *Bullitt*, 377 U.S. 360, 367. Statutes and rules using the term "solicit" have been uniformly upheld. *Ohralik* v. *Ohio State Bar Association*.

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[14] Plaintiffs attempt to circumvent this difficulty by suggesting that the appropriate test here is whether all the regulated groups are afforded the same solicitation rights with respect to those sharing a "commonality of interest" with them. Leaving aside the considerable definitional and line-drawing problems that such a test would involve, plaintiffs have failed to demonstrate why a commonality of political interest between shareholders and employees of member corporations and trade association political committees should be assumed simply because the corporations belong to the trade association.

[15] See note 11 *supra*.

436 U.S. 447, 462, 464; *In re Primus*, 436 U.S. 412, 438; *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S.793; *Securities and Exchange Commission* v. *May*, 229 F.2d 123 (2d (Cir. 1956); *Sargent* v. *Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974); *Federal Election Commission* v. *National Right to Work Committee, supra*, slip op. 12. Consequently, plaintiffs do not contend that the absence of a definition of "soliciting contributions" in Section 441b(b)(4)(D) renders Section 441b(b)(4)(D) unconstitutionally vague (Br. 79). Instead, they claim only that the "overbreadth" of this phrase permits the issuance of inconsistent opinions by the Federal Election Commission.

Plaintiffs are particularly critical (Br. 71-75) of Advisory Opinion 1979-13, in which the Commission concluded that a proposed article for inclusion in a separate segregated fund's publication going to employees and retirees was a solicitation within the meaning of the Act

> "since it describes RAYPAC's activities and encourages employees to participate in RAYPAC by commending the enthusiasm of these employees whose participation in RAYPAC has indicated awareness of the connection between their welfare and government policies toward business." (Plaintiffs' App. at 330.)

Since the article could in all fairness be considered by a reasonable person to be a request for a contribution,[16]

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[16] The article quoted the chairman of the corporate political action committee as follows:

> "I was glad to see that Raymond has so many employees who realize that the welfare of us all is tied very closely to government policies and attitudes toward business. RAYPAC is one way we can make the voice of business people in our industry heard in this country. I hope we continued [sic] to have such an enthusiastic group." (Plaintiffs' App. at 329-331.)

the Commission cannot be faulted even if we would decide differently. See note 9 *supra*. Moreover, the Commission stated the newsletter article would not be an improper contribution solicitation if it were sent only to persons that may be solicited under the statute or regulations and told the recipients that their contributions would have to be returned if coming from impermissible sources. Finally, the Commission's opinions are only advisory in nature and not binding upon the party requesting them. 2 U.S.C. § 437f. In contrast, in Advisory Opinion 1979-66, the Commission determined that publication of certain financial information by a separate segregated fund was not a "solicitation" within the meaning of the Act. The information in question merely reported the total sum collected by the Associated General Contractors Political Action Committee and did not commend the enthusiasm of PAC contributors or encourage readers to support that separate segregated fund's activities. Since it was permissible for the Commission to come out differently in these and other cases, the Commission's Advisory Opinions do not demonstrate that the phrase "soliciting contributions" in Section 441b(b)(4)(D) is overbroad and unconstitutionally vague under the First and Fifth Amendments. That being the sole reason given for plaintiffs' attack, the third question must be answered "No."

VI. *It Is Unnecessary to Define "trade association" in Section 441b(b)(4)(D)*

The final constitutional question certified to us is as follows:

> "Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term 'trade association,' as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States?"

The only plaintiffs challenging the absence of a statutory definition of "trade association" are plaintiffs National Lumber and Building Material. Dealers Association and its political action committee. They claim that they are unable to ascertain whether they may solicit only the executive and administrative personnel of its 27 incorporated trade association members or also the executive and administrative personnel of the corporate members of its member trade associations.[17] The Commission has ruled that a federation of trade associations like National Lumber and Building Material Dealers Association may also solicit contributions from the executive and administrative employees of its members' corporate members provided that the trade association and federation are "affiliated"; that is, that they are considered one political action committee for the purpose of contribution ceilings. See 11 C.F.R. § 114.8(g)(1) and (2); see also 2 U.S.C. § 441a(a)(5) and Commission Informational Letter, Fed. Elec. Camp. Fin. Guide, CCH ¶6031. If these two plaintiffs are still worried about the propriety of their proposal, an advisory opinion can of course be obtained from the Commission under Section 437f. In any event, this alleged confusion arises because of these plaintiffs' status as a federation of trade associations and a political committee of a federation of trade associations respectively, not from the absence of a statutory definition of "trade association."

"Trade association" like "solicitation," is a frequently used and well understood term. The Commission's regulations reflect the commonly understood meaning of the term.

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[17] Certain corporate retail dealers comprise the members of this Association's 27 corporate trade association members (Plaintiffs' Br. 102).

For example, 11 C.F.R. § 114.8(a), promulgated on April 13, 1976, provides:

> "A trade association is generally a membership organization of persons engaged in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which enures to the benefit of any member."

Similarly, 11 C.F.R. § 114.8(g)(1) provides:

> "A federation of trade associations is an organization representing trade associations involved in the same or allied line of commerce."

In view of the plain and ordinary meaning of "trade association" and the Commission's adherence to that meaning, we conclude that the absence of a statutory definition of the term as it is used in Section 441b(b)(4)(D) does not violate the due process clause of the Fifth Amendment.[18]

The cause is remanded for further proceedings consistent with the four answers given herein.

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[18] Plaintiffs have recently called our attention to the statement in *Federal Election Commission* v. *Lance*, 617 F.2d 365, 367 (5th Cir. 1980) that "there is a serious question whether the Federal Corrupt Practices Act is constitutional." Since note 1 of the opinion shows that the court was referring only to Sections 441b(a) and (b)(2) which are not before us, the statement is inapplicable here.

APPENDIX

2 U.S.C. § 441b provides:

§441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, dis-

tribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or separate seggreated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this sub-paragraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from

soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate seggregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policy-making, managerial, professional, or supervisory responsibilities.

PELL, *Circuit Judge*, with whom FAIRCHILD, *Chief Judge*, and BAUER, *Circuit Judge*, join, concurring in part, dissenting in part.

While I concur in parts II, V, and VI of the majority opinion, I am in disagreement with parts III and IV and their negative answers to the district court's certified questions 1 and 2. Accordingly, I respectfully dissent a to parts III and IV of the majority opinion.

As a matter of prefatory observation, I note that a fact of modern day living is that anyone who has a mailing address which has been in existence for a duration of more than a minimal period of time is besieged by a rather steady succession of solicitations to contribute to invariably worthwhile causes. These unsolicited solicitations, despite the merits applicable to the proposed donees are, by virtue of their multiplicity, frequently annoying. Nevertheless, it does not seem to me that potential annoyance should be the occasion for spreading a protective Big Brother cloak of prohibition.

Also at the outset, I note that the question of whether 2 U.S.C. § 441b(b)(4)(D) infringes the plaintiffs' First Amendment right of *speech* was not certified to this court by the district court. It is well established, however, that solicitation implicates a variety of speech interests, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632, (1980),[1] as well as associational rights protected by the First Amendment. Consequently, it is impossible to extricate that subsection's effect on speech from an analysis of associational interests even assuming

[1] The Court identified three speech interests involved in solicitation: communication of information, dissemination of ideas, and advocacy of causes. *Id.*

arguendo that this court is bound by the precise questions certified.[2]

Prior Restraint

Subection (D)'s requirement that a trade association obtain the prior approval of its corporate member before soliciting the shareholders and executive and administrative personnel of the corporate member is, in my opinion, an invalid prior restraint. The majority holds that subsection (D) does not constitute a prior restraint because it finds no actual prior restraining effect on the free flow of political information, inasumch as the plaintiffs still engage in many First Amendment activites.

It is true, as the majority opinion notes, that the plaintiffs do still undertake various forms of political expression. Yet, the First Amendment does not protect the rights of speech and assembly only when they are entirely abrogated. The United States Supreme Court repeatedly

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[2] In that instant case, the plaintiffs' proposed statement of constitutional questions for certification phrased the first issue more broadly than the district court's final formulation. The plaintiffs would have certified the question as "[w]hether 2 U.S.C. § 441b (b)(4)(D), both facially and as applied, violates the First Amendment." Judge Marshall subsequently narrowed the proposal to reach only subsection (D)'s effect on the right of assembly.

2 U.S.C. § 437h(a) (Supp. 1979) provides that "[t]he district court immediately *shall* certify *all* questions of constitutionality of this Act to the United States courts of appeals for the circuit involved, which shall hear the matter sitting en banc" (emphasis added). It would seem therefore that a district court's failure or refusal so to certify *all* constitutional questions cannot be insulated from appellate review. The majority apparently assumes that this court is not bound by the precise constitutional questions certified because it addresses the prior restraint issue which, it acknowledges, was not specifically certified.

has stressed that total suppression of speech is not necessary to invoke First Amendment protections against otherwise invalid prior restraints. *Consolidated Edison Co.* v. *Public Service Commission*, 100 S.Ct. 2326, 2335, n.10 (1980); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1978); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1974); *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1973) (per curiam). In *Southeastern Promotions, supra*, 420 U.S. at 556, for example, the Court acknowledged that "it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical ["Hair"] in the community." Likewise, the fact that the plaintiffs in the instant case take advantage of avenues of political expression other than the solicitation of the prohibited groups will not validate an otherwise invalid prior restraint.

The majority opinion seems to conclude that there is no prior restraining effect in part because the plaintiffs are free to solicit anyone to *join* their organizations and, once someone joins, that person can be solicited for contributions as a trade association member an unlimited number of times. That technically is true. The Federal Election Commission (FEC or Commission), however, has so broadly construed the term "solicitation" as to create inhibiting doubt even on the solicitation of memberships.[3]

The Commission's Advisory Opinion 1979-13, for example, prohibits an organization from publishing "an arti-

[3] I am not unmindful that I have concurred in Part V of the majority opinion. I have done so because I do not regard the term "solicitation" as such as being either overbroad or vague, which is not to say that it may not very well achieve a chilling impact by political overextension.

cle in its corporate newsletter which would inform employees of the *activities and existence* of its separate segregated fund," Federal Election Campaign Financing Guide ¶5403 at 10,419 (CCH) (dissenting opinion of Chairmen Aikens and Friedersdorf) (emphasis added), merely because the article "commend[ed] the enthusiasm of employees whose participation . . . has indicated awareness of the connection between their welfare and government policies toward business." *Id.* In that case, the Commission found the proposed article to be an unlawful "solicitation" even though it contained no request for contribusion found the proposed article to be an unlawful "solicitations," coupled with the Federal Election Campaign Act's (FECA or Act) harsh civil and criminal sanctions,[4] has, as a practical matter, substantially inhibited the plaintiffs' ability to communicate with the shareholders and administrative and executive employees of member corporations in their common political cause.

The majority's assertion that trade associations are free to urge any individual to support or oppose a particular candidate does not render subsection (D)'s prohibition any less severe. The United States Supreme Court recognized in *Buckley* v. *Valeo,* 424 U.S. 1, 22 (1976), that money contributions enable "like-minded persons to pool their resources in furtherance of common political goals." Thus, while the organizations can urge anyone to support a particular candidate, their inability to solicit still impingers upon their associational interests. The Court recognized that the right to association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley* v. *Valeo, supra,* 424 U.S.

[4] 2 U.S.C. § 437g (Supp. 1979).

at 65-66. Solicitation of member corporations' shareholders and administrative and executive personnel provides a particularly important source of funds for the trade associations since many of their members are corporations which are prohibited by § 441b(a) from contributing.

Finally, the majority's recognition that the plaintiffs can accept contributions from anyone, although they cannot solicit everyone, appears to me to be irelevant. The trade associations' First Amendment interests in speech and association are nonetheless curbed by their inability to solicit those with whom they share an affinity of interest but who do not happen to contribute.

The district court's findings of fact illustrate that, while the plaintiffs can and do engage in some First Amendment activity, the prior restraint set up by subsection (D) has exerted a chilling effect on the exercise of First Amendment rights by the trade associations and the potential recipients of the solicitation.[5] The district court found, for example, that in 1977 the Restaurateurs Political Action Committee (RPAC) requested permission to solicit from 7,509 of the National Restaurant Association's (NRA) corporate members, but received permission from only 1,087. In 1978 only 1,168 members, out of the 15,759 requested, granted permission to solicit. Moreover, during its annual fundraising banquet in 1977, RPAC experienced a loss of members who were willing to sell tickets because of fear of the Act's criminal and civil penalties for violating the Act. Because of these and other difficulties imposed by the Act, the banquet was abandoned in 1978. The court also found that Bread Political Action Committee (BreadPAC) has not been able to receive authorization from the mem-

[5] First Amendment protections extend to the communication, the speaker, and the intended recipients. *Virginia State Bd. of Pharmacy, supra,* 425 U.S. at 657.

ber corporations of the American Bakers Association (ABA) to solicit since 1976. But for the restriction imposed by subsection (D), the Committee would solicit the executive and administrative employees and shareholders of the member corporations. Finally, the district court found that

> [t]he 1976 Amendments to the Act have limited the ability of each of the Plaintiffs to raise voluntary funds for political purposes, have limited each Plaintiff's ability to engage in protected political speech and association, and have limited the right of persons with similar or related interests to receive from the Plaintiffs communications expressing political ideas, opinions, views, and beliefs and thereby associate themselves with the Plaintiffs.

Subsection (D) admittedly does not resemble the typical prior restraint which involves delegation of unlimited discretion to an administrative official. This is a distinction without a difference, however, because "[*a*]*ny* system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (emphasis in original), *quoting Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58, 70 (1963). *See, e.g., ACLU* v. *Jennings*, 366 F. Supp. 1041, 1049-52 (D.D.C. 1973), *vacated sub nom., Staats* v. *ACLU*, 422 U.S. 1030 (1975) (FECA provision held to be a prior restraint even though the Court acknowledged that it technically did not resemble a typical licensing system because the Act designated the media, not the government, to act as censor).

A statute subjecting First Amendment freedoms to a prior restraint will be upheld only if it enunciates definite and objective standards to guide the censor's discretion. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-

51 (1969). In the present case, the Act wholly fails to establish any standards to harness the member corporations' discretion except that a corporation cannot approve solicitation by more than one trade association per year. Thus, a corporation arbitrarily can deny permission to solicit for any reason whatsoever even if it has not yet granted permission to any other trade association for that year.

A judgment that subsection (D) operates as an invalid prior restraint would not compel the conclusion that Congress cannot regulate trade association solicitation in any manner whatsoever. Rather, the statute fails because it does not set up adequate procedural safeguards. The Supreme Court has recognized that "[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute." *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965).

Infringement of First Amendment Freedoms

Even if § 441b(b)(4)(D) were not invalid as a prior restraint, it would nevertheless be unconstitutional for impermissibly infringing the plaintiffs' rights of speech and assembly.[6] While these rights are not absolute, "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley* v. *Valeo*, *supra*, 424 U.S. at 24, *quoting NAACP*

[6] The majority opinion seems to misconceive the effect of my challenge to subsection (D). I merely think the exception provided by this subsection to subsection (A) should not be rendered virtually meaningless by the imposition of the prior consent provision. In sum, I am only challenging the prior consent aspect.

v. *Alabama*, 357 U.S. 449, 460-61 (1958). The Court in *Buckley, supra*, 424 U.S. at 25, ruled that a statute infringing First Amendment rights can only be sustained if (1) the restriction serves a "sufficiently important [governmental] interest," and (2) it "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." A statute infringing First Amendment freedoms will be invalid if less restrictive means of accomplishing the governmental objective are available. *Village of Schaumburg, supra*, 444 U.S. at 637. The Federal Election Campaign Act was enacted primarily to diminish the actuality and appearance of corruption in the federal election process resulting from large financial contributions. *Buckley* v. *Valeo, supra*, 424 U.S. at 25. In *Buckley*, the Court's decision to uphold contribution limitations (while simultaneously striking down expenditure ceilings) was largely premised on the understanding that contribution ceilings would not reduce resources available to both candidates and political committees. It is important to note that *Buckley* predicated the Act's restrictions on trade association solicitation. The Court reasoned:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons.

424 U.S. at 21-22.

Subsection (D) nonetheless has dramatically decreased the available pool of potential contributors to the plaintiff organizations. The Lumber Dealers Political Action Com-

mittee's (LuDPAC) eight largest federated members informed LuDPAC that, but for the Act's 1976 amendments, they would have supplied LuDPAC with their membership rosters which total over 4,300 retail dealers. RPAC similarly was unable to solicit over 100,000 persons present at each of the NRA's annual 1977, 1978, and 1979 conventions who otherwise would have constituted an available solicitation pool. Bread Political Action Committee's solicitations likewise were limited by subsection (D). In 1975, BreadPAC solicited 1,250 individuals; from January to May 1976, BreadPAC had already solicited 1,904 persons. From May 11, 1976, the effective date of the 1976 amendments, through December 1976, the number of individuals solicited by BreadPAC dropped to 462. In 1977, only 577 persons and in 1978 only 421 persons, were solicited.

The drop in the number of persons available for solicitation was reflected in a dramatic decrease in contributions. BreadPAC's contributions, for example, declined from $40,190 in 1975, to $33,712 in 1976, to $28,000 in 1977 and $29,550 in 1978. The statistics indicate that the premise of *Buckley*, that contribution totals received by candidates and political associations should not be diminished by the Act's restrictions, is subverted by subsection (D).

The majority cites employee freedom from employer economic coercion as one purpose underlying the enactment of subsection (D). While this objective may have motivated Congress, the restrictions imposed on trade associations do not, in fact, serve that goal. The direct employment relationship existing between employer and employee provides an inherently coercive setting for employer solicitation. *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 387 (D.C. Cir. 1980). Yet, § 441b(b)(4)(B) allows corporate employers to solicit any corporate employee twice yearly.

The Act seeks to limit further employee solicitation by requiring prior corporate approval for solicitation by trade associations. The Government contended that because trade associations represent corporate interests, corporate employees will feel bound to contribute to the associations. In fact, the potential for such coercion logically should be less in the trade association context than in the direct employer/employee relationship because employees do not depend upon the trade associations for their livelihood. Even if some compulsion arguably exists, subsection (D) heightens, rather than diminishes, any such coercion. Explicit corporate consent to trade association solicitation subtly, yet directly, would appear to suggest to employees that the employer favors a contribution.

As well as subverting the very purpose it was intended to serve, subsection (D) imposes a substantial impact upon associational freedoms. The plaintiffs' expert testified that corporate employees share an "affinity of interest" with the trade associations to which their corporate employers belong.

Consequently, subsection (D) is not a narrowly drawn provision which achieves the asserted governmental objective as the First Amendment requires. Other less drastic means could ensure employee freedom from coercion at the hands of trade associations while treading less severely upon invaluable First Amendment rights. The Act could, for example, require trade association solicitations to remind the corporate employees that they need not contribute. The Act could additionally mandate that a system of solicitation be adopted which would guarantee the anonymity of the contributor. Congress applied just such safeguards to a corporation's solicitation of its own employees in preference to an absolute ban.[7]

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[7] 2 U.S.C. §§ 441b(b)(3)(C); 441b(b)(4)(B) (Supp. 1979).

The majority further reasons that because there are no limits on the number of trade associations to which a corporation can belong, subsection (D) prevents a proliferation of trade associations which might allow member corporations to undermine the Act's contribution limitations.[8] The Government argued that this result would flow from the fact that member corporations often are involved in the selection of a trade association's board of directors and that, therefore, a corporation could set up a number of "dummy" trade associations. The FEC contended that corporate members "control" trade associations' boards of directors.

The district court's findings of fact regarding the composition of the boards of directors in the instant case, however, indicate that the danger is overstated. Two directors each of the National Lumber and Building Material Dealers Association are selected by each federated member, the past two national presidents, the Association's officers, and various other persons. The NRA's board of directors, which numbers sixty members, is selected to represent NRA members according to their geographical distribution. Each member of the American Bakers Association is entitled to send one representative to sit on the ABA's governing board which is made up of approximately 350 individuals with another 350 alternates. It is obvious, therefore, that *individual* corporate "control" of any of these trade associations is diluted by the numbers of representatives of different corporations which compose each trade association's board of directors. While the directors

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[8] 2 U.S.C. § 441a(a)(1)(C) prohibits contributions by any person to any political committee (other than those of candidates or national political parties) in excess of $5,000 per year; § 441a(a)(1)(A) forbides any contribution to a political candidate for federal office in excess of $1,000 annually.

undoubtedly share many similar interests, their diversity in terms of factors such as size, product, or location necessarily restricts their potential identity of interest.

Finally, the Act provides other mechanisms to ensure contribution limitation compliance. Section 437g (Supp. 1979) imposes civil and criminal penalties for violating the Act. Moreover, FECA establishes a comprehensive set of reporting requirements. All political committees and separate segregated funds, for example, must file with the Commission information including names of affiliated organizations, names of officers, receipts, expenditures and their recipients, names of each person, organization or political committee which has contributed over $200 per year, and any other information the Commission chooses to require.[9] No single corporation could set up a "dummy" trade association solely to subvert the Act without being exposed by the disclosure requirements and without being subject to criminal sanctions for having willfully violated the Act. Indeed, the Court in *Buckley* rejected the similar argument that limitations on candidate expenditures were necessary to ensure compliance with the Act's contribution limitations because the Act's substantial civil and criminal penalties, coupled with its exhaustive reporting requirements, were sufficient to police against illicit contributions. 424 U.S. at 56. The Court in

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[9] 2 U.S.C. §§ 433-34 (Supp. 1979). I also note 2 U.S.C. § 441a (a)(5) which provides as follows:

> For the purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee. . . .

Buckley sustained the Act's contribution limitations because such limtations still allowed individuals to support candidates through special interest groups. At a time when subsection (D) did not restrict trade asociation solicitation in the present manner, the Court noted with approval that

> [w]hile providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates.

424 U.S. at 28 n.31.

Fifth Amendment Due Process

The majority characterizes the plaintiffs' due process argument as a complaint that subsection (D) prohibits trade associations from soliciting anyone but the executive and administrative employees of their member corporations. The opinion then proceeds to strike down that argument by pointing out that incorporated trade associations have the same solicitation rights as (1) other corporations under § 441b(b)(4)(A) and (B), and (2) other membership organizations under subsection (C), although recognizing that the structure and constituency of trade associations differs radically from that of other corporations and membership organizations.

The plaintiffs' argument is not that they are forbidden by the statute from soliciting anyone other than the group mentioned in subsection (D). Rather, the trade associations argue that while the statute technically does grant them many of the same privileges as those enjoyed by cor-

porations and other membership organizations, these solicitation rights are largely illusory because the actual structure of most incorporated trade associations forecloses these solicitation options. The Supreme Court in *Buckley*, 424 U.S. at 31 n.33, recognized that even when a statute facially appears to be evenhanded "[t]he appearance of fairness, however, may not reflect political reality."

Most trade associations and federated trade associations are incorporated. As corporations, it is true that trade associations theoretically can solicit their own stockholders under § 441b(b)(4)(A). However, the Government conceded in oral argument that most incorporated trade associations are nonprofit corporations which do not have any stockholders. Thus, the typical corporation possesses a substantially greater solicitation pool than an incorporated trade association.

As a corporation, an incorporated trade association may also solicit its own executive and administrative employees and their families pursuant to subsection (A). Again, however, this pool comprises a very small group of solicitees for trade associations in comparison to most corporation. The ABA, for example, has only a twelve person staff. We do not know how many of these twelve are executive or administrative employees. BreadPAC has no staff employees of its own. ABA employees carry out BreadPAC's daily work. Similarly, the small size of most trade association staffs renders meaningless subsection (B)'s additional provision allowing corporations twice yearly to solicit their rank and file employees.

As a membership organization, a trade association can solicit its own indivdual and noncorporate members pursuant to subsection (C). Corporate members are prohibited from contributing by § 441(b)(a). Individual and noncorporate members however, also offer an insignificant solicitation pool to trade associations unlike other more typical membership organizations. The district court found

that "many, if not most, members of trade associations are incorporated."

It is this very difference in structure that should give rise to broadened, not restricted, solicitation rights for trade associations because the statutory avenues of solicitation available to corporations and membership organizations generally prove fruitless when applied to incorporated trade associations. Yet, subsection (D) requires corporate consent to carry on the only form of trade association solicitation which would prove meaningful. My reading of the record indicates that such consent is generally refused.

A comparison between labor organizations and trade associations is illustrative. Labor organizations can, without consent, twice annually solicit shareholders and nonmember employees of corporations with which they have collective bargaining agreements. § 441b(b)(4)(B) (Supp. 1979). Moreover, both a federated labor organization (*e.g.*, AFL-CIO) and its member International (*e.g.*, International Carpenters' Union) can solicit individual members of the locals which comprise the Internationals simultaneously and without prior permission because 11 C.F.R. § 114.1(e) (1980) provides that a local union member is also a member of the federated union for solicitation purposes.

By contrast, a federated trade association must either conduct joint solicitations or have solicitation rights delegated to it in order to solicit the members of its member trade associations. 11 C.F.R. 114.8(g) (1980). Because solicitation of regular trade association member corporations themselves is barred by § 441b(a) as the majority acknowledged, the only practical solicitation of trade association members (most of which are corporations) would be to solicit the trade association member corporation's stockholders and executive and administrative employees,

the human components of the member corporations.[10] Yet, subsection (D) prohibits such solicitation without prior corporate consent.

The Government contended in oral argument that these distinctions between labor organizations and trade associations are valid because federated unions and their International members are "affiliated," and, as such, share a common $5,000 limitation on contribution to candidates for federal office. A federated trade association, however, can only solicit its regional, state and local affiliates or members *if* it is affiliated with these groups and, therefore, shares the $5,000 contribution limitation. 11 C.F.R. § 114.8 (g)(1) (1980). Thus, the purported difference is irrelevant.

The discrimination alleged by the plaintiffs is borne out by the district court's findings of fact. The court found that "[t]he 1976 Amendments to the Act place no comparable prohibitions and limitations upon membership organizations and their political action committees, corporations and their political action committees, labor organizations and their political action committees, or independent political action committees."[11] The unique

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[10] It is understandable that the plaintiffs do not seek to solicit all corporate employees because all corporate employees would not share the same commonality of interest with the trade association as would the corporate shareholders and executive and administrative personnel.

[11] The majority opinion develops at some length an orange-apple lack of relationship between unions and trade associations. I have not, in this dissent, asserted that they are "similarly situated" parties. I do suggest, however, that just as certain loyalties and commonalities of purpose do exist between a union and its membership, similar communities of interest may well exist between corpo-

(footnote continued)

structure and composition characteristic of most trade associations differentiates them from other corporations and membership organizations as detailed above. It is this very difference, augmented by subsection (D)'s prior consent provision, which gives rise to the discrimination which the plaintiffs suffer under the statute as applied.

In order for a discriminatory classification which impacts upon fundamental First Amendment rights to survive judicial scrutiny, the governmental interest served must be substantial and statutory classification narrowly tailored to serve that interest. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99 (1972). As detailed above, subsection (D) is not a narrowly drawn classification which serves the interests asserted.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(footnote continued)

rate shareholders and executive employees and the trade associations of which the corporation is a member. These trade associations have been formed for the purposes of advancing the best business interests of the particular trade. It would seem unusual if the shareholders and executive employees, whose own financial well being would be equated with that of the corporation, indeed, the trade, did not have a real interest in supporting the trade associations, that is, if they were allowed to be solicited.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 80-1146

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLICICAL ACTION COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants-Appellees,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed December 18, 1980)

NOTICE IS HEREBY GIVEN that Bread Political Action Committee, National Lumber and Building Material Dealers Association, Lumber Dealers Political Action Committee, National Restaurant Association, and the Rectaurateurs Political Action Committee, plaintiffs in the above-captioned case, hereby appeal to the Supreme Court of the United States from the decision filed and the judgment entered on December 5, 1980, by the United States Court of Appeals for the Seventh Circuit. Plaintiffs appeal that portion of the decision rejecting their claims on the merits and answering each of the certified questions

in the negative. This appeal is taken pursuant to 2 U.S.C. §437h(b).

Dated: December 18, 1980

Jeffrey Cole

Jeffrey Cole
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
Counsel for Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

I, Jeffrey Cole, a member of the bar of the Supreme Court of the United States and counsel for plaintiffs herein, hereby certify that on December 18, 1980, pursuant to Rule 10.2 of the Rules of the Supreme Court of the United States, I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on each of the parties herein by depositing a copy of the NOTICE OF APPEAL in the United States Mail, Chicago, Illinois, with first class postage prepaid, properly addressed to counsel of record for defendants, Charles N. Steele, Esq., General Counsel, Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463, and to The Honorable John W. McGarry, Acting Chairman, Federal Election Commission, 1325 K. Street, N.W., Washington, D.C. 20463.

All parties required to be served have been served.

DATED: December 18, 1980

Jeffrey Cole

Jeffrey Cole
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300

APPENDIX C

The First Amendment to the Constitution of the United States provides in pertinent part that:

> Congress shall make no law . . . abridging freedom of speech, or . . . of assembly.

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall be deprived of life, liberty or property, without due process of law. . . .

2 U.S.C. §437h provides:

> § 437h. Judicial review
>
> (a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc. The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgments, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Appeal to Supreme Court; time for appeal. Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) Advancement on appellate docket and expedited disposition of certified questions. It shall be the duty of the court of appeals and of the Supreme Court of

the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

2 U.S.C. §441b provides:

§441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing office, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift

of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock,

from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions ,and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX D

DEPARTMENT OF JUSTICE
Washington 20530

November 3, 1975

Mr. John G. Murphy
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D. C. 20463

Re: *Advisory Opinion Request 1975-23*

Dear Mr. Murphy:

Reference is made to several informal discussions between our respective staffs concerning the referenced Advistory Opinion Request (A.O.R.), which has been submitted to the Commission by two political committees affiliated with the Sun Oil Corporation pursuant to 2 U.S.C. 437f, and to your draft Advisory Opinion which your staff was kind enough to make available to us for review and comment.

The A.O.P. seeks the views of the Commission on whether the Sun Oil Corporation may defray the administrative expenses of the two political committees consistent with 18 U.S.C. 610. The draft Advisory Opinion proposed by your staff would conclude that neither political committee may do so on the facts presented. For reasons described below, we disagree.

From the description provided in the A.O.R., SUN-EPA appears to us to represent an activity by the Sun Oil Corporation through which the corporation encourages its employees to participate in politics in general, including making personal contributions to candidates or political committees of their choice. To facilitate the latter, the

corporation offers to its employees a convenient payroll deduction plan where the employee may request the payroll office to withhold a portion of his salary which is transmitted by the corporation to candidates or political committees designated by the contributing employee. Provided that the corporation in no manner suggests to the contributing employee the identity of certain candidates or committees which should be the beneficiaries of such personal contributions, provided that absolutely no pressure of any kind is applied to induce participation in the program, and provided corporate funds are not indirectly contributed to the ultimate recipients through such means as artificially inflating employees' salaries, we would tend to view the corporate disbursements effected to administer such a program as "non-partisan" in nature. That is to say, under these stringent circumstances, such corporate disbursements, in themselves, could not be said to favor one candidate for Federal office over his opposition, although the general objective of the program is certainly "political" in that it encourages employees to participate voluntarily in politics through *personal* contributions of the *employees' own choosing.*

We have long been of the opinion that 18 U.S.C. 610 cannot be applied to prohibit unions and corporations from using their general assets to engage in activities which are completely non-partisan in nature consistently with the First Amendment. In this regard, such a prohibition would certainly have an effect on expression, albeit an indirect one. At the same time, we fail to see how the application of Section 610 to non-partisan expenditures such as this serves any compelling Federal interest, or is even remotely related to either of the two purposes which the section was enacted to protect: i.e. to protect the integrity of the Federal elective system from the corrupting

influence of infusions of vast aggregates of corporate and union wealth, and to protect the interests of minority stockholders and union members from having their monies used to support political candidates they personally oppose. Moreover, there is dicta in several cases decided under 18 U.S.C. 610 which, in our view, reflect a judicial recognition that this statute prohibits only the support of partisan political activity. See: *United States* v. *Auto Workers*, 352 U.S. 567 (1957); *United States* v. *Pipefitters Local Union #562*, 434 F.2d 1116, 1121 (8th Cir. 1970); *United States* v. *Construction and General Laborers Local #264*, 101 F. Supp. 869, 875 (D. Mo. 1951); *Cort* v. *Ash*, 496 F.2d 416 (3rd Cir. 1974), reversed on other grounds, 422 U.S. 65 (1975). Finally, the fact that the Hansen Amendment, added to Section 610 by the 1971 Federal Election Campaign Act, recognized a "non-partisan" exception only in the case of "voter registration drives" and "get-out-the-vote compaigns" which were directed at a corporation's stockholders and a union's members, is not dispositive of the matter. The 1971 amendatory language was intended primarily to codify preexisting case law, which was indicated above recognized a broader "non-partisan" exception to this statute. *United States* v. *Pipefitters Local #562*, 407 U.S. 385 (1972). A construction of this language which would render it narrower than First Amendment requirements would be illogical and inconsistent with the rule of statutory construction that where possible statutes should be interpreted to achieve constitutional results.

SUN-PAC, from the description given in the A.O.R., would appear to us to satisfy all of the statutory requirements of a voluntary segregated fund, except that it intends to solicit the corporation's employees, as well as its stockholders and their families. The preliminary conclusion of your staff that this particular "segregated fund"

is not among those permitted by 18 U.S.C. 610, as amended, seems to us to be predicated upon concern that the statutory text itself, given a strict reading, confines the "segregated fund" exception exclusively to funds which confine their solicitations to union members, corporate stockholders, and their respective families.

As indicated above, it has been our view that a strict reading of the scope of such limiting language, descriptive of an exception to a criminal statute, is not appropriate where it would lead to a result which infringes upon Constitutionally-protected activity. Here we note that at least one Circuit Court has addressed the concept of the segregated fund in Constitutional terms and concluded that members of a union have a right under the First Amendment to associate together through a political committee affiliated with the union, to express themselves politically through such a committee, and that it would be a derogation of these First Amendment rights to prohibit the union from defraying the administrative expenses of such a committee or from controlling the disposition of any funds which it voluntarily raises from its membership. *United States* v. *Pipefitters Lolcal #562*, 434 F.2d 1116, 1119-1121 (8th Cir. 1970), reversed on other grounds, 407 U.S. 385 (1972). Although this analysis was conducted in the context of union members, we suggest that it is equally applicable to any group of individuals which has a "special relationship" to the union or the corporation which is sponsoring the segregated fund in question. See: *United States* v. *C.I.O.*, 335 U.S. 106, 121 (1948). While we recognize that there may be many grey areas presenting difficult questions as to whether a given class enjoys an adequately close affinity of interest with a given union or corporation so as to require that its segreated fund be permitted to solicit them, employees of a corporation (or

the employees of a union for that matter) are certainly within this class. Indeed, very recently the Supreme Court has expressly held that 18 U.S.C. 610 does not prohibit a union-supported segregated fund from soliciting voluntary contributors from the union's employees. *United States* v. *Pipefitters*, 407 U.S. 385, 409. It is, therefore, only logical that the segregated fund exception to this section has the same reach with respect to corporations.

For these reasons, we would be disposed to decline prosecution under 18 U.S.C. 610 of any facts situation such as those described in Advisory Opinion Request 1975-23 concerning SUN-EPA and SUN-PAC.

Sincerely,

Richard L. Thornburgh

RICHARD L. THORNBURGH

Assistant Attorney General

APPENDIX E

ADVISORY OPINIONS

[¶5403] AO 1979-13: *Description of PAC Activities in Company Newsletter*

[*A description of PAC activities cannot appear in a company newsletter since this is considered a solicitation and the newsletter would be distributed to non-solicitable persons, such as retirees. Answer to A. Pearce Godley, Chairman, RAYPAC, 2801 S. Post Oak Road, Houston, Texas 77066.*]

This is in response to your letter of March 26 and April 5, 1979, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to publicizing the existence of the Raymond International Inc. Employees' Political Action Committee ("RAYPAC").

Your letter states that RAYPAC is a separate segregated fund established by Raymond International Inc. ("the Corporation") and empowered by the corporation to ony solicit executive and administrative personnel, stockholders, and their spouses. *You add the Corporation publishes a newsletter, entitled the "Raymond Record," six times a year for the information of employees and retirees of the Raymond Group of Companies.* It is distributed to all of the Corporation's *permanent employees and retirees, as well as stockholders and certain other interested parties on request.* Attached with your letter is an article which you are considering for inclusion in the "Record." *The article states the amount of money raised and spent by RAYPAC and the methods used by RAYPAC in determining to whom it should contribute.* The article further

points out the number of corporate employees who "participated in" RAYPAC's activities in 1978 and includes a quotation from you as RAYPAC chairman:

> "I was glad to see that Raymond has so many employees who realize that the welfare of us all is tied very closely to government policies and attitudes toward business. RAYPAC is one way we can make the voice of business people and our industry heard in this country. I hope we continued [sic] to have such an enthusiastic group."

You ask whether, *under these circumstances, inclusion of the article in the "Record would be permissible under the Act.* If not, you ask whether such article would be permissible without the sentence: "However, the PAC's by-laws state that RAYPAC may accept voluntary contributions for any lawful contributor."

Under the Act, a corporation or a separate segregated fund established by a corporation may make two written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. 2 U.S.C. §441b(b)(4)(B). Section 114.6 of the Commission's regulations provides that such solicitations may be made only by mail addressed to stockholders, executive and administrative personnel, or employees at their residences, and must inform the recipient of the requirements of this section. For purposes of this section the term "employees" does not include retired employees who are not stockholders. 11 CFR 114.6(a).

Since the "Record" reaches a group of persons which RAYPAC may not generally solicit for contributions except as provided under §114.6, the issue presented is whether the proposed article is a solicitation for contributions to RAYPAC and thus prohibited from being included in the "Record."

OPINIONS

The legislative history of the Act indicates that informing persons of a fundraising activity is considered a solicitation. See Advisory Opinions 1976-27, [¶5213], 1976-96 [¶5227], and 1978-17 [¶5307], copies enclosed. See particularly AO 1976-27 which includes quotes from Senators, Allen, Cannon, and Packwood during Senate floor debates on the 1976 Amendments to the Act. Also, Representative Hays of Ohio, in explaining the corporate and union solicitation provisions of the 1976 Amendments (2 U.S.C. §441b), stated:

> [We] determined that any action [that] could fairly be considered a request for a contribution should be treated as a solicitation. 122 Cong. Rec. 43779 (daily ed. May 3, 1976).

The Commission is, accordingly, of the view that the proposed article would be a solicitation within the meaning of the Act since it describes PAYPAC's activities and encourages participation in RAYPAC by commending the enthusiasm of employees whose participation in RAYPAC has indicated awareness of the connection between their welfare and government policies toward business. Therefore the article may not be included in the "Record" or any other publication of the Corporation which is distributed to persons that RAYPAC is otherwise prohibited from soliciting for contributions.

Additionally, your letter asks whether the article would be acceptable for inclusion in the "Record" by removing the sentence which states: "However, the PAC's bylaws state that RAYPAC may accept voluntary contributions from any lawful contributor." The Commission answers this question in the negative. The elements of the article as discussed above that make it a contribution solicitation

would still be present in the proposed article even with the deletion of that particular sentence.

Your letter makes reference to Advisory Opinion 1978-97 wherein the Commission concluded that a contribution solicitation could be included in a membership publication because the organization involved took certain precautionary steps to instruct its personnel that contributions to the PAC must be checked and returned if made by a nonmember of the organization, and because the solicitation was primarily directed only at its members (with an incidental circulation beyond its membership). In your case, however, neither the Corporation nor RAYPAC propose to take precautionary measures like those described in AO 1978-97 [¶5385]. Moreover, the medium for the solicitation (i.e. the "Record") is not directed only to the executive and administrative personnel of the Corporation, but rather to a larger group of persons that RAYPAC is either prohibited from soliciting altogether or must solicit under the conditions of 11 CFR 114.6. If the Corporation or RAYPAC take precautionary measures as described in AO 1978-97 and if the "Record" has only an incidental circulation to persons that RAYPAC is either prohibited from soliciting altogether or must solocit under the conditions of 11 CFR 114.6, the proposed article would not then be refused as an improper contribution solicitation under the Act and regulations.

This response constitues an advisory opinion concerning the application of a general rule of law stated in the Act or prescribed as a Commission regulation, to the specific factual situation set forth in your request. See 2 U.S.C. §437f.

Dated: May 25, 1979.

DISSENTING OPINION
OF
COMMISSIONERS JOAN D. AIKENS AND MAX L. FRIEDERSDORF
TO
ADVISORY OPINION 1979-13

Raymond International seeks to publish an article in its corporate newsletter which would inform its employees of the activities and existence of its separate segregated fund, RAYPAC. The Commission has determined that the publishing of such an article constitute a solicitation subject to the restrictions of 2 U.S.C. §441b(a). We disagree with that conclusion which, in our opinion, is unsupportable by either the statute, the Commission's regulations or the legislative history of the Act.

The statute does not define the word "solicitation," nor do the Commission's regulations. Furthermore, there is nothing in the statute or the context in which the word "solicitation" is used to indicate a Congressional intent to regulate something other than the persons and circumstances under which a PAC may request voluntary political contributions. Nonetheless, this Advisory Opinion and others before it conclude that "informing persons of a fundraising activity is considered a solicitation." (See Advisory Opinion 1976-27 [¶5213].) In other words, a "solicitation" is not merely a request for a contribution, but it is also any other activity which, in the absence of a request, might in some way provoke an individual to make what is in effect an unsolicited contribution. This is a truly remarkable contortion of what we consider to be a simple word which has a self-evident meaning.

It is equally remarkable that the legal justification for this interpretation is the tautology quoted in the Opinion and attributed to Representative Hays, i.e., a solicitation is a request for a contribution. (Another piece of legislative history, a colloquy between Senators Allen, Cannon and Packwood and referred to in the Opinion, is equally inconclusive and unenlightening.)

What is happening here has been previously (and unsuccessfully) attempted by the Commission in another question of interpretation. Recently, a Federal District Court has rejected the Commission's attempt to apply the rules of "express advocacy," to a communication in which advocacy was merely implied. *FEC* v. *AFSCME* (D.C. Cir.) Civil Action No. 78-2114 [¶9078]. It is simply a matter of time before a court similarly concludes that restrictions on §441b solicitations are not applicable to a communication such as the one proposed by RAYPAC which merely "describes RAYPAC's activities and encourages employeee participation in RAYPAC by commending the enthusiasm of employees whose participation in RAYPAC has indicated an awareness of the connection between their welfare and government policies towards business." Descriptions and commendations for enthusiasm do not sound like solicitations to us.

Dated: May 23, 1979.